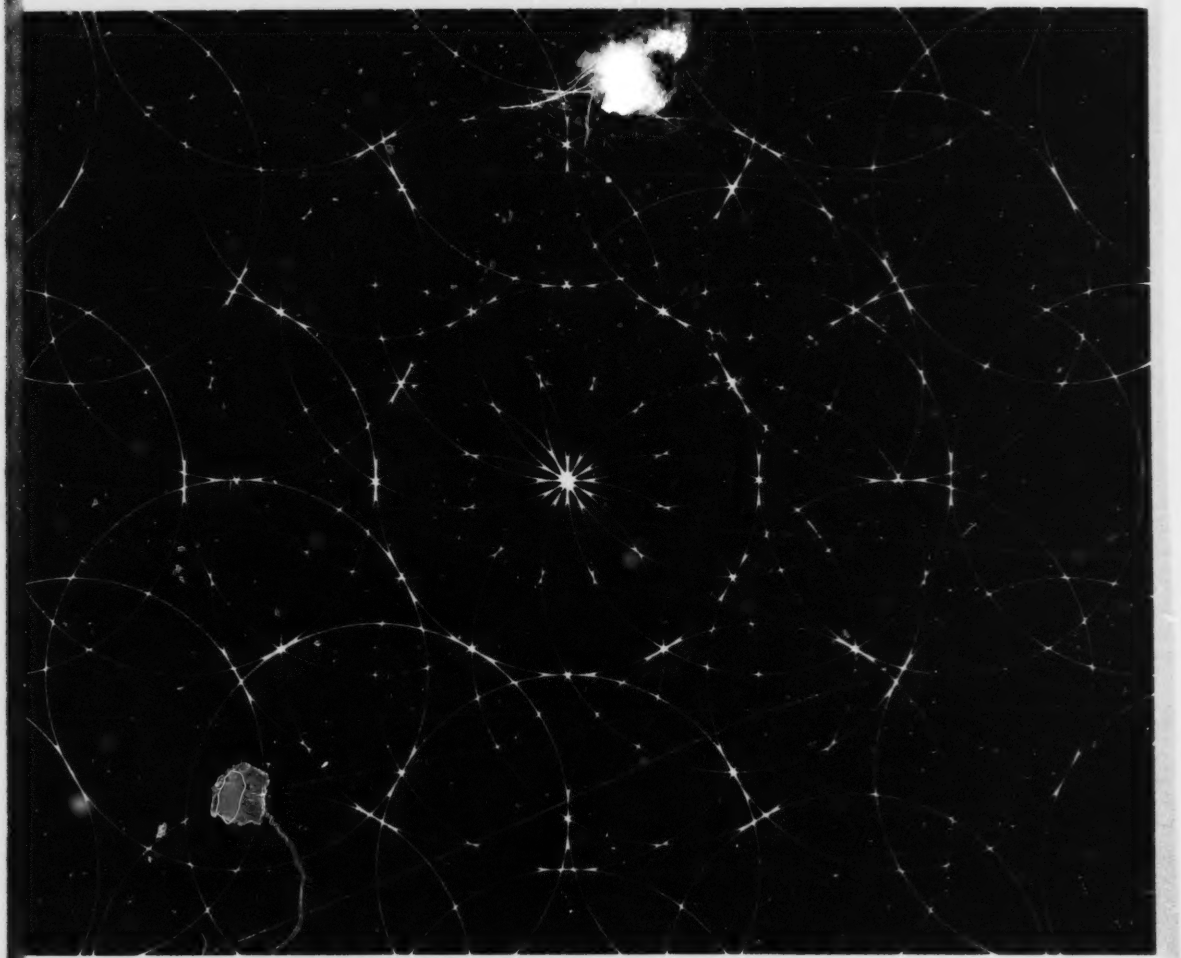
Summary of Report on

1984

An Examination of `The Dower Act´



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LAW REFORM COMMISSION

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COMMISSION DE RÉFORME DU DROIT

SUMMARY

OF

REPORT ON AN EXAMINATION OF "*THE DOWER ACT*"

November 19, 1984

Report #60

The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

The Commissioners are:

Clifford H.C. Edwards, Q.C., *Chairman*
Knox B. Foster, Q.C.
George H. Lockwood, J.
Lee Gibson
John C. Irvine

Chief Legal Research Officer:

Ms. Donna J. Miller

Legal Research Officers:

Ms. Colleen Kovacs
Ms. Valerie C. Perry
Ms. Janice Tokar

Secretary:

Miss Suzanne Pelletier

The Commission offices are located at 521 Woodsworth Building, 405 Broadway, Winnipeg, Manitoba R3C 3L6. Tel. (204) 945-2896.

PREFACE

"The Dower Act" was referred to the Manitoba Law Reform Commission for review as a consequence of the enactment, in October 1978, of *"The Marital Property Act"* and *"The Family Maintenance Act"*. These two Acts effected fundamental reform and substantially changed the framework for determining the proprietary rights between spouses.

A few changes were made to *"The Dower Act"* to coincide with the passage of this new legislation. No comprehensive review of *"The Dower Act"* was made at that time; in particular, no thorough study was undertaken to examine what relationship, if any, should exist between the rights and protections contained in *"The Dower Act"* and those created by *"The Marital Property Act"*.

Pursuant to this reference we have published a Report on *"The Dower Act"* which has been presented to the Attorney-General, the Honourable Roland Penner, Q.C.

Copies of the Report may be obtained from the Office of the Queen's Printer. This summary is published to assist those who prefer to read an outline of the Report rather than the full document. In the event of inconsistency, the summary yields to the terms of the Report.

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Tel. (204) 945-3101

I. OVERVIEW OF *"THE DOWER ACT"*

Simply stated, the principal objective of *"The Dower Act"* is to provide some measure of economic security to spouses. Specifically, *"The Dower Act"* provides, in brief, the following rights:

(1) The surviving spouse is afforded the right to elect a fixed share of the deceased's net estate where the will fails to make the minimum provision as set out in section 15 of *"The Dower Act"*.

(2) A life estate in the deceased spouse's homestead (family home) is provided to the surviving spouse for the duration of his/her life.

(3) The written consent of the non-owning spouse is required for any disposition or encumbrance of the homestead (family home).

At the onset it should be noted that this Report does not purport to be a comprehensive review of all aspects of the law relating to succession. It is confined to an examination of *"The Dower Act"*. We have, however, through the course of our study, identified a number of deficiencies in *"The Testators Family Maintenance Act"* and *"The Devolution of Estates Act"*. It is contemplated that a separate report examining these Acts will issue shortly with appropriate recommendations for reform.

The text of the Report is divided into two parts. Part I is devoted to a detailed examination of spousal property rights at the death of a spouse. In Part II of the Report attention turns to the balance of *"The Dower Act"* which generally sets forth the protections afforded to the homestead.

II. PART ONE: DISTRIBUTION OF PROPERTY ON DEATH

1. The Current Law

When a spouse dies leaving a will which fails to provide the surviving spouse with one-half of the deceased's net real and personal property, the survivor may elect to take a fixed share, namely, one-half of the deceased's net estate.[1]

The following formula emerges from section 15 of *"The Dower Act"*:

$$\text{DOWER SHARE} = \frac{\text{NET ESTATE}}{2} - \left[\begin{array}{l}\text{Any insurance}\\ \text{proceeds on}\\ \text{the life of}\\ \text{the deceased}\\ \text{spouse payable}\\ \text{to the survivor}\end{array} + \begin{array}{l}\text{Any post-nuptial}\\ \text{benefit received}\\ \text{by way of gift}\\ \text{or advancement}\\ \\ \\ \end{array} + \begin{array}{l}\text{Any benefit}\\ \text{received by}\\ \text{the survivor}\\ \text{pursuant to}\\ \textit{"The Marital}\\ \textit{Property Act"}\end{array}\right]$$

The "elective" nature of this right is the choice of the surviving spouse to accept the provisions made by the deceased's will, if any, or to take the fixed share determined by statute. Where the survivor elects to take the fixed share (s)he must give up all benefits conferred on him/her by way of the deceased's will.

2. The Need for Reform

At issue with respect to the fixed share is whether such a scheme is the fairest and most appropriate means of adjusting the economic position of the spouses where the marriage is terminated by death. The Commission is of the view that the passage of time since *"The Dower Act"*'s inception in 1918, coupled with recent developments in the law of marital property, have brought to light serious deficiencies. These deficiencies can fairly be divided into two classifications: namely, those defects which are of a conceptual nature, and those defects of a technical nature which have rendered the law unsatisfactory and confused. The conceptual deficiencies may be summarized as follows:

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[1] Manitoba's position is unique in Canada. We are the only province which provides the surviving spouse with a fixed share of the deceased's estate. In addition, we have adopted a discretionary approach under *"The Testators Family Maintenance Act"* which enables dependants of the deceased to seek further provision for their proper maintenance and support by way of application to the court.

- The manner in which the fixed share is calculated may cause an unfair allocation of property on death for principally three reasons:

  First, the fixed share makes no distinction as to how property is acquired. Generally stated, the survivor is entitled to one-half of the assets which form part of the deceased's net estate; the source of the property of the deceased is immaterial.

  Second, the fixed share imposes an interest without regard to the personal wealth which the survivor may have amassed during his/her life. For example, if the wife should predecease her husband, the husband would be entitled to one half of the wife's net estate even though his assets far exceed those of his wife.

  Third, the fixed share fails to recognize and account for the length of the spouses' marriage.

- The fixed share, in part, is confined to maintenance protection for the surviving spouse. Section 16 of the Act arbitrarily defines monetary sums which would eliminate any further entitlement of the survivor to share in the deceased spouse's estate. This form of unilateral contracting out may mean that the surviving spouse of a marriage might not receive as large a share of property as a spouse entitled to an accounting under *"The Marital Property Act"*.

- A fundamental defect in the legislation is the apparent ease with which the applicability of the fixed share may be avoided. If the deceased spouse channels all of his/her property to others such that there are no assets left in the estate, the right to a fixed share of one half of the deceased's net estate consists of a right to take one half of nothing.

Some of the conceptual deficiencies arise due to the disparity between marital property legislation and dower legislation. The key inquiry is whether there is any functional reason why a distribution at death should be so widely different from that accompanying marriage breakdown during the spouses' joint lives.[2]

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[2] While it is true that *"The Marital Property Act"* is no longer confined to marriage breakdown, in practice, it is marriage breakdown which ordinarily prompts a spouse's application for an accounting of property.

It is the view of the Commission that some mechanism for sharing in the deceased spouse's estate on death is undoubtedly of positive value. A statutory right to share at death in the property accumulated during the marriage is rooted in the view of marriage as a partnership and derives from the presumption that each of the partners contributed, directly and indirectly, to the acquisition of property.

The Commission concludes that the termination of marriage by death should not produce markedly different results from those when the marriage has broken down during the spouses' joint lives. To the extent that there are differences, they must have a rational foundation.

3. Options for Reform

We assess the suitability of three possible approaches which could be taken to reform, namely:

(a) the continuation of the fixed share with appropriate amendments to remedy the deficiencies;

(b) a system of judicial discretion;

(c) a deferred sharing regime operative on death.

The Commission concludes that the adoption of the deferred sharing regime would provide the most satisfactory legal framework for determining the surviving spouse's share, if any, of the deceased's estate. A deferred sharing regime is the scheme operative under "*The Marital Property Act*". The aim of the legislation is to achieve an equitable distribution of marital property, irrespective of which spouse actually owns or holds title to the property.

The principal considerations which have led us to favour a deferred sharing regime are as follows:

(1) A deferred sharing regime would achieve a fairer and far more equitable division of property than the present fixed share by taking into account the separate property accumulations of the survivor, the source of the property of each of the spouses and the length of the marriage.

(2) On balance, the Commission believes that the principles for sharing under *"The Marital Property Act"* are equally forceful on death; we can see no compelling reasons for continuing the two distinct property distribution schemes.

(3) A deferred sharing regime on death would help to achieve simplification and consolidation of matrimonial property law with succession legislation.

(4) A deferred sharing regime would provide the surviving spouse with a large measure of security and certainty.

We would point out that four provinces, namely Saskatchewan, Nova Scotia, New Brunswick and Newfoundland presently apply a deferred sharing regime on death.

4. Specific Recommendations for Reform; Deferred Sharing on Death

We turn now to set forth the *principal* recommendations respecting the operation of a deferred sharing regime on death. A comprehensive summary of all of the recommendations contained in the Report may be found at page 236.

a) Underlying principles

(i) The mechanics

Under the proposed regime, on dissolution of the marriage by the death of a spouse, the surviving spouse would be entitled to one half of the economic gains made by both during the marriage. As the proposed regime is based generally upon the principles set out in *"The Marital Property Act"*, we recommend that the scheme should be housed as a separate part of that Act.

The steps necessary to effect an allocation of property on death may be summarized as follows:

STEP 1: What must be done first is the valuation of all property owned by each spouse at the date of death, together with all death benefits payable to the survivor and to the deceased's estate. The deceased spouse's inventory is prepared without considering the provisions of the will, if any, or the result on an intestacy.

STEP 2: Each then deducts enforceable claims of third party creditors.

STEP 3: Also subtracted are those property acquisitions which are not subject to sharing under *"The Marital Property Act"*.

STEP 4: What is left is the net value of the property that each spouse amassed during marriage. The deceased's net gains are added to those of the survivor. In practical terms where the deceased spouse has accumulated a larger net gain during the marriage, the survivor may, at his/her election, call upon the deceased spouse's personal representative to make the appropriate balancing payment. This balancing claim has priority over all bequests and devises contained in the deceased spouse's will and over an application by a dependant of the deceased under *"The Testators Family Maintenance Act"*.

With but one exception[3] the Report recommends that any property acquired by the surviving spouse under the will should be charged or credited against the balancing claim. With this approach, the testator's plan would be preserved insofar as it provides benefits for the surviving spouse. Accordingly, in order to determine whether there is any merit in seeking an accounting on death, the surviving spouse must ascertain whether or not his/her shareable property acquisitions, together with the benefits, if any, conferred by way of will in his/her favour total one half of the combined shareable gains. If so, it would be pointless to seek an accounting as no balancing claim would be payable in favour of the surviving spouse.

From the standpoint of the deceased's personal representative, there is one convenient method to ascertain whether a balancing claim is payable in favour of the survivor. Provided the deceased has not channelled property to others, the personal representative need only review the inventory of property submitted for probate; where the deceased has conferred at least one-half of his/her estate by way of will to the survivor, no balancing claim would be payable. Given that most spouses name their survivor as beneficiary of all or substantially all of their estate, we do not anticipate that the regime will often be invoked.

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[3] The Report recommends that where a life estate in the homestead is conferred by way of will on the survivor, (s)he need not credit its value against the balancing claim.

(ii) Sharing only in favour of the surviving spouse

If the survivor's shareable assets exceed those of the deceased spouse, the Report recommends that the surviving spouse should not have to pay into the estate of the deceased spouse. We acknowledge that this constitutes a rather key exception to the principle of equal sharing, but as a matter of policy we support the preferred treatment of the surviving spouse in these circumstances.

(iii) No judicial discretion

The Commission recommends that there should be no discretionary power vested in the court to vary the equal division of property on death. It is our view that the differing circumstances of death suggest this approach for the following reasons:

- A discretionary power on death has led to differing results in those jurisdictions which have incorporated such a power. In some instances, it has been employed to restrict the survivor to simply those benefits conferred on him/her under the deceased's will. In other cases, a discretionary power has been employed to award the surviving spouse with very generous benefits which appear to permit an unwarranted encroachment on the predeceasing spouse's power of testamentary freedom.
- There would be much difficulty in applying the tests which govern the unequal distribution of property where one of the spouses is dead.
- We are concerned that the presence of a discretionary power would necessitate the need for a court application, or at the very least, increase the number of applications to court.
- To import a discretionary power would be a novel concept as *"The Dower Act"* does not presently contemplate the exercise of any discretionary power in ascertaining the survivor's fixed share.

(iv) No court application

We propose that an accounting of property on death may ordinarily be determined by the surviving spouse and the deceased's personal representative without resort to a court application. This will provide the survivor with the means of obtaining his/her share, if any, of the deceased spouse's estate without introducing the expense and inevitable delay that a required court application would bring.

Where, however, the surviving spouse is the personal representative of the deceased's estate, (s)he would be in an obvious position of conflict. In such cases an agreement respecting an allocation of property in favour of the spouse may first require court approval.

(v) Application of deferred sharing to an intestacy

Apart from the homestead provisions, *"The Dower Act"* has no application where the deceased dies without a will. The survivor's share is determined by the scheme of property distribution set out in *"The Devolution of Estates Act"*.

It is the Commission's view that the surviving spouse should be entitled to seek an allocation of property on death in the event of an intestacy, whether it be a whole or partial intestacy. We were persuaded to adopt this approach so that the survivor could invoke the anti-avoidance measures proposed under the deferred sharing regime.

The quantum of the balancing claim would first be determined in the same manner as an ordinary accounting on death and without regard to the results on an intestacy. However, the surviving spouse would then charge all benefits received or to be received by way of intestate succession against the balancing claim in order to prevent the survivor from benefitting twice - once under a deferred sharing regime and then again under intestate succession.

(vi) Earlier separation

In our estimation, the determining factor as to whether a *separated spouse* should be entitled to an allocation of property on death should be whether there has been an earlier property settlement effected by the spouses. Accordingly, the Report recommends that a complete property settlement made after or in anticipation of separation or divorce should operate as a bar to an allocation of property on death, in the absence of reconciliation. Where the spouses have reconciled, we recommend that the surviving spouse should be able to seek an allocation of property on death with respect to the property acquired after the resumption of cohabitation.

(vii) Contracting out

It is our view that spouses should remain free to contract out and to define their property rights by way of mutual agreement. We believe, however, that there must be some precautions to ensure that a spouse understands the effect of any agreement which may adversely affect the rights of that spouse. Accordingly, we recommend that the court should have the power to override a spousal agreement where it was substantially unfair at the time it was entered into and where the spouse who challenges the agreement entered into it without obtaining independent legal advice.

III. ANTI-AVOIDANCE PROTECTION

The object of an anti-avoidance scheme is to provide some measure of economic protection to the surviving spouse where the predeceasing spouse has removed assets from the estate which otherwise would have been shareable in an accounting.

1. The Current Law

At present, a spouse may defeat or reduce a survivor's claim to his/her fixed dower share by channelling all or a portion of his/her property to others before death. For example, the spouse might make an outright gift of a substantial sum of money to a friend. The spouse may also circumvent the policy of *"The Dower Act"* by various devices short of an outright disposition. These devices may be described as will substitutes in that the spouse retains some degree of control over or interest in the property but the property does not form part of the spouse's estate at death. For example, the spouse may set up a joint bank account with a friend. While the spouse may use these monies for his/her own exclusive ownership before death, the whole balance of the account generally accrues to the surviving account holder (i.e. the friend) on the death of the spouse.

In contrast to *"The Dower Act"*, *"The Marital Property Act"* does contain some anti-avoidance provisions which were designed to ensure that one spouse could not deprive the other of a right to an equal share in all of the potentially divisible assets. Simply stated, there are certain safeguards afforded a spouse when the other spouse has made an excessive gift, a transfer for inadequate consideration, or has dissipated assets and thereby jeopardized the financial security of the family.

2. Anti-avoidance Protection on Death - The Case in Principle

The Commission is of the view that the surviving spouse should be ensured at least the same measure of protection and benefits as a spouse is accorded when seeking an allocation of marital property during the spouses' joint lives. It would be anomalous if a spouse were allowed to defeat an accounting on death but not an allocation during the spouses' joint lives. The proposed deferred sharing regime on death will be effective only to the extent that there is an estate out of which a balancing claim may be granted. What we envisage is a comprehensive, uniform anti-avoidance scheme which would operate in an accounting on death as well as in an accounting during the spouses' joint lives. To achieve this end, some of our recommendations entail consequential amendments to *"The Marital Property Act"*.

Of course, where the surviving spouse is the recipient of the disposition or the designated beneficiary of the will substitute, (s)he would be required to make a full accounting of these benefits. The Commission's concern is directed at those instances where the predeceasing spouse has named a third party, other than the spouse, to be the recipient.

3. Recommendations For Reform

Generally stated the proposed anti-avoidance scheme sets out four activities or types of conduct which may be investigated by the court, namely:

(a) the dissipation of an asset;

(b) an unreasonably large disposition;

(c) defined will substitute arrangements; and

(d) a contract to leave property by way of will.

Before we turn to outline each of these measures *briefly*, we should make two preliminary comments. First, the Report recommends the incorporation of a specific estate planning device. That is to say, any transfer of property would ordinarily be immune from review if made with the written consent of the other spouse in the manner and form prescribed by statute. Second, the Commission recommends that, for purposes of an accounting on death, all of the proposed anti-avoidance protections should only apply prospectively.

(a) The dissipation of an asset

It is the view of the Commission that where the predeceasing spouse or the surviving spouse carelessly or deliberately dissipates an asset with complete indifference as to the consequences, (s)he may be called upon to include the value of the dissipated asset in his/her inventory of property.

(b) An unreasonably large disposition

This recommendation contemplates a two-step process: first, there is the inclusion of the unreasonably large disposition in the appropriate spouse's inventory of property and second, there is the question of effecting recovery from the recipient of the transfer.

STEP ONE
Inclusion of Asset

Where a transfer may be characterized as an UNREASONABLY LARGE DISPOSITION, whatever the spouse's intention was in making the transfer, its value, should be added to the inventory of the spouse making the transfer. To assist the court in determining whether a disposition is unreasonably large and to provide greater certainty of its ambit, the Report sets forth a number of criteria at page 127 to guide the court.

STEP TWO
Recovery From Third Party

The Commission appreciates that any provision for the recovery of the value of what would otherwise be a valid disposition of property is a substantial step to take. Accordingly, the right to claim contribution from a third party should only arise where;

(1) there are insufficient other assets in the estate out of which to permit a balancing claim, and

(2) the complainant spouse has proven both an intent on the part of the spouse to remove property from his/her shareable estate in order to defeat or diminish a balancing claim and the third party's notice (whether actual or constructive) of such an intent.

In addition, the Report recommends that the extent of the third party's liability to contribute should be governed by two further factors. First, the third party who has benefitted should be liable to contribute no more than the extent to which the disposition was unreasonably large at the time of the transfer. In this way, the third party is protected in the event that the property has increased in value. Second, where the property has depreciated substantially since the date of the original transfer by the spouse, the Report recommends that the third party who has benefitted should not be liable to contribute more than the fair market value of the property at the date of an application to seek an accounting.

(c) Will substitutes

This class of disposition is of particular import on death. As we noted earlier, a will substitute may be described as an incomplete disposition in that the spouse retains continued benefits or control over the property until death, but the property does not form part of the deceased's estate. The present "*Marital Property Act*" does not contain any express provisions respecting will substitutes.

Just as is the case with unreasonably large dispositions, a two-step process is contemplated.

STEP ONE
Inclusion of Asset

It is the Commission's view that the value of property disposed of by a predeceasing spouse by way of any of the defined will substitute devices should be included in the predeceasing spouse's inventory for purposes of determining the balancing claim. However, a will substitute arrangement would only be included to the extent that the spouse did not receive a full and adequate consideration in money or money's worth.

In order to achieve certainty and predictability for the transferor spouse and the transferee, we define those will substitutes which may be included. These are set forth at p. 140 of the Report.

STEP TWO
Recovery from Third Parties

It is the Commission's view that in the case of will substitutes recovery from a third party should not be confined to those cases where the third party has notice of an intent to evade an accounting. Nor should a cut-off period govern the review of will substitute arrangements.

However, just as in the case with unreasonably large dispositions, the Report recommends that the right to seek contribution from the recipient of a will substitute device should only arise if there are insufficient assets in the net estate out of which to satisfy the balancing claim. In addition, it is recommended that the maximum amount which the third party would be called upon to contribute should not exceed the value of the benefit received less the value of the considration, if any, provided by the third party.

(d) The review of contracts to leave property by will

Another means by which a spouse may defeat or jeopardize an accounting of property is by making a contract to leave property by will. We recommend that the property which is the subject matter of the contract should not generally be liable to the occurrence of a balancing payment unless the court is satisfied on the following three points:

- The contract should only be interfered with where the value of the property furnished by the deceased spouse exceeds the consideration provided by the promisee to the contract. We set forth a number of factors at p. 156 of the Report to assist the court in determining whether the value of the property exceeds the value of consideration received by the spouse.
- The spouse must have made the contract to leave property by will with the intention of defeating or reducing a likely balancing claim. We do not wish to affect contracts made by a spouse in good faith and in the normal course of arranging his/her affairs.
- The promisee must have had actual or constructive notice of the spouse's intent.

IV. PART TWO: THE HOMESTEAD PROTECTIONS

In Part Two of the Report we examine in detail two principal homestead protections, namely

(1) the life estate afforded the surviving spouse in the homestead;

(2) the right of the non-owning spouse to veto a proposed disposition of the homestead.

1. The Life Estate in the Homestead

The principal function of the life estate is the preservation of the home for the surviving spouse and children, if any, upon the death of the owning spouse. The Commission recommends that the surviving spouse should continue to have the statutory entitlement to a life estate in the homestead. It is our view that the right of the survivor to an estate for his/her life in the homestead should be independent of and in addition to the right to seek an allocation of property on death.

2. Consideration of an Exemption for the Life Estate

Having determined that the survivor may invoke a life estate in the homestead, the question arises as to whether that interest should be exempt from the claims of specified creditors. We conclude that it would be inappropriate at this time to recommend in isolation an exemption for the homestead from the specified claims of creditors. Specifically, a consideration of an exemption for the life estate should be examined as a part of two larger areas of concern:

(i) the availability of and the adequacy of exemptions for the benefit of the family during the owner's life;

(ii) the position of the survivor generally, whether the interest in the homestead be acquired by statute, by way of will or intestate succession.

3. What is a Homestead?

(a) Urban home

In the vast majority of cases there is no uncertainty in identifying the homestead premises; ordinarily it would encompass the house in which the spouses live and any garage, garden or yard which is used in connection with the property. Where part of a home or property adjacent to the home is used for purposes other than residential (e.g. retail grocery store with an attached residence) the Commission favours the existing primary purpose test. In other words, if the primary use of the land is as a home, it should ordinarily be immaterial that a portion is used incidentally for other purposes; the surviving spouse should be entitled to a life estate in such premises. The Report also recommends that condominium units should properly be encompassed within the homestead definition.

(b) Rural home

The Commission is of the view that the present rural homestead definition does not set forth a uniform approach to farm property. The extent of the life estate may presently depend upon how title is held or the configuration of the land itself. Amendments have been proposed to the rural definition with the aim of ensuring that the life estate in the rural homestead would encompass not only the dwelling house but also the surrounding lands which are occupied, cultivated or operated in connection therewith as a single plot or farming unit, up to the extent of 160 acres.[4]

4. The Requisite Property Interest in the Homestead

The requisite interest for invoking the homestead protections is presently unclear. As the relevant ownership interest is fundamental to determining whether the homestead protections arise, the Commission is of the view that it calls for some legislative clarification. Accordingly, we recommend:

- the homestead should embrace land, whether freehold or leasehold, provided that in the case of leasehold premises, the term of the lease is in excess of three years.
- The application of the homestead protections should be excluded from any joint estate in land which is held by a spouse together with another person other than his/her spouse.

5. The Veto Power of the Non-Owning Spouse

At present, the owner spouse may not dispose of the homestead or any interest therein without the consent of the non-owning spouse. The Commission recommends that the requirement of written consent by the non-owning spouse be maintained. We further propose that both husbands and wives alike should be required to acknowledge their consent. The husband is not presently required to complete a certificate of acknowledgment.

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[4] It should be remembered that for purposes of an allocation of property on death, the full value of the family farm, being a commercial asset, would ordinarily be included in the appropriate spouse's inventory of property and the survivor would be entitled to one-half of the shareable gain.

The Commission's primary concern is that spouses should not relinquish rights in the homestead without giving an informed consent. To that end, the prescribed form and the examination required for purposes of completing the certificate of acknowledgment should properly inform a spouse; they ought not to be a mere formality. Accordingly, we recommend that the prescribed forms for a written consent and certificate of acknowledgment should be amended so that from a reading of the appropriate form itself both the spouse and those called upon to administer the acknowledgment will understand and appreciate fully the homestead protections. These forms are set forth at pp. 202-204 of the Report.

6. Consequences of a Disposition Made in Contravention of the Statute

The most important and difficult question arising with respect to the veto power is what happens when the statutory requirements have not been complied with. The fundamental problem to be addressed is that of balancing the spouse's interest of protecting the home and the interests of bona fide third parties who deal with the owner and acquire an alleged interest in the homestead. We are of the view that homestead protections should restrict contractual and other legal rights only to the extent that it is thought necessary to fulfil the objectives of "*The Dower Act*".

(a) Current law

Unless the non-owning spouse consents in writing in the manner prescribed by statute, any disposition of the homestead is invalid and ineffective.[5] Accordingly, even if the owner's spouse approved and assented to the sale of the home but simply failed to furnish a written consent, the purchaser could raise the fact of non-compliance and withdraw from the contract leaving the owner without remedy.

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[5] This, however, is subject to two saving sections or curative provisions set forth in subsections 8(4) and (7) of "*The Dower Act*" which endeavour to protect third parties.

Similarly, it would appear that owners themselves may invoke *"The Dower Act"* in order to withdraw from a transaction without penalty. In one case the non-owning spouse was an informed and willing participant in the negotiations and attached her signature to the acceptance of an offer but the husband was permitted to withdraw from the transaction because of the absence of strict compliance with the formalities of *"The Dower Act"*. Stated simply, the policy of *"The Dower Act"* to protect the non-owning spouse has, on occasion, been used to deny others their proprietary interests.

(b) Proposed solution

(i) Disposition voidable on application of the non-consenting spouse

Broadly stated, it is our view that any disposition of the homestead which is made in contravention of the requirement of written consent should be voidable at the instance of the non-consenting spouse *alone*, upon application to the appropriate court. This approach would preclude a purchaser from seeking cover under the statute in order to repudiate a transaction honestly made.

In our estimation, this approach would not put the *prudent* third party inordinately "at risk". Where (s)he has taken the precaution of ensuring that a written consent and certificate of acknowledgment has been duly completed or a dower affidavit properly executed, the third party should be entitled to rely upon these documents and the disposition would not be open to attack. In other words, our proposal would be subject to the curative provisions now set forth in *"The Dower Act"* under subsections 8(4) and 8(7).

Where, however, these precautions have not been taken and there has been no pretence of consent on the part of the spouse, the Report recommends that the non-consenting spouse should, *prima facie*, be entitled to set aside the disposition.

(ii) Estoppel

We do propose that there should be one case where the non-owning spouse may be estopped from raising the lack of written consent in conformity to the Act: namely, where that spouse with full knowledge of his/her homestead right and through deliberate words or unequivocal acts contrives to convey the representation to the third party that (s)he concurs in and assents to the proposed disposition. Our aim in incorporating the common law doctrine of estoppel by representation would be to prevent a spouse from insisting upon strict legal rights arising by statute when it would be inequitable for him/her to do so.

7. Remedies of Non-Owning Spouse

The non-owning spouse is dependent upon the owner's good faith; rights in the homestead may easily be extinguished. For example, the owner may falsely swear in an affidavit that (s)he has no spouse or that the property is not the homestead, thereby defeating the rights of the innocent spouse. Accordingly, the Report recommends that the non-consenting spouse should have a cause of action against the owner spouse if a disposition of the homestead is made without consent through the fraud or wrongful act of the owner spouse.

In the event that a judgment cannot be satisfied against the owner spouse, it is the view of the Commission that a claim for payment may be directed to the Assurance Fund. The Assurance Fund is set up under "*The Real Property Act*" and its object is to indemnify those who have been deprived of an interest in land.

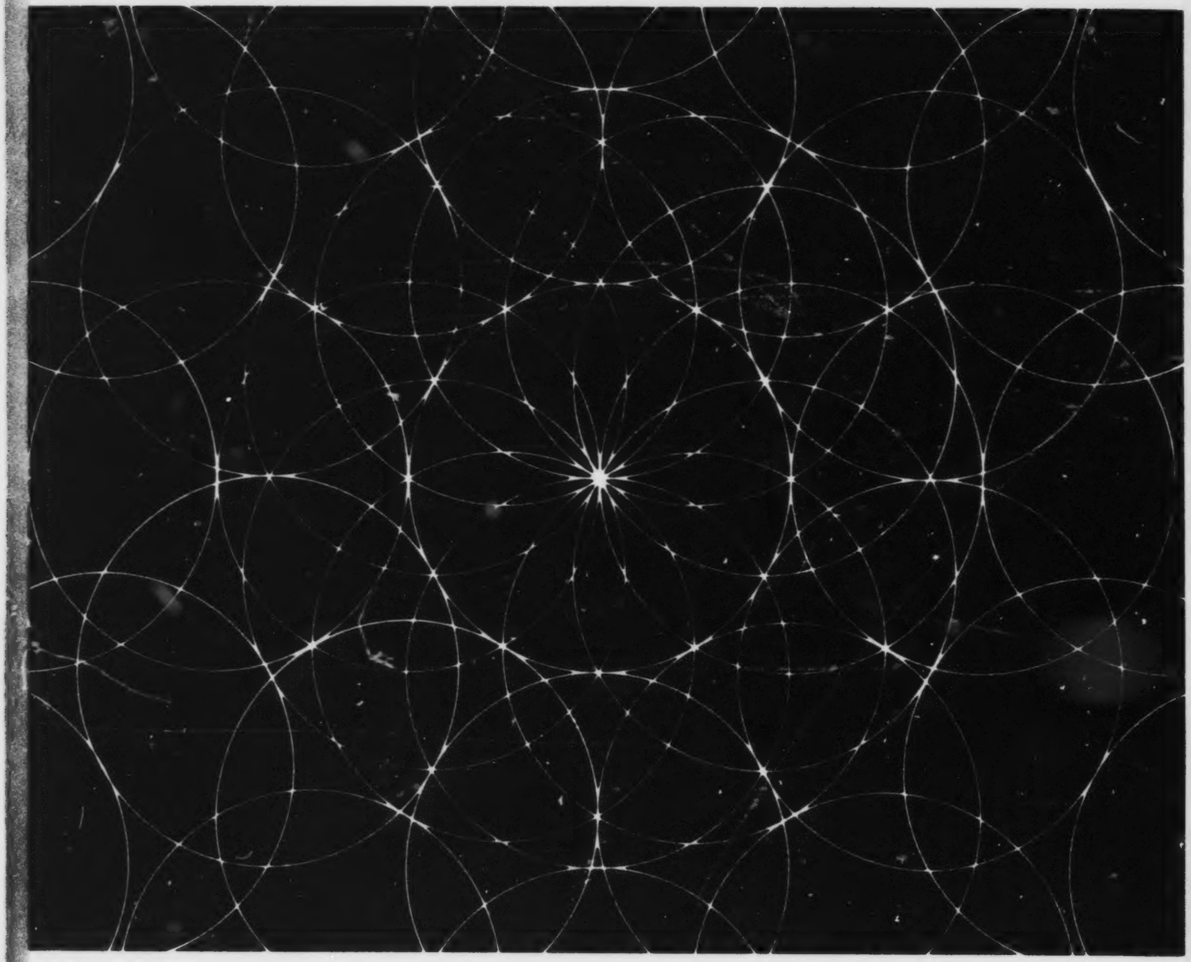
8. "The Homesteads Act"

Finally, we suggest that the title of "*The Dower Act*" be changed to "*The Homesteads Act*" as it would now be confined to simply those protections arising from the homestead. A draft Act incorporating our proposed homestead recommendations is included in the Report.

Report on

1984

An Examination of ‘The Dower Act’



MANITOBA
LAW REFORM COMMISSION

LAW REFORM COMMISSION MANITOBA **COMMISSION DE RÉFORME DU DROIT**

REPORT

ON

AN EXAMINATION OF "*THE DOWER ACT*"

November 19, 1984

Report #60

The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

The Commissioners are:

Clifford H.C. Edwards, Q.C., *Chairman*
Knox B. Foster, Q.C.
George H. Lockwood, J.
Lee Gibson
John C. Irvine

Chief Legal Research Officer:

Ms. Donna J. Miller

Legal Research Officers:

Ms. Colleen Kovacs
Ms. Valerie C. Perry
Ms. Janice Tokar

Secretary:

Miss Suzanne Pelletier

The Commission offices are located at 521 Woodsworth Building, 405 Broadway, Winnipeg, Manitoba R3C 3L6. Tel. (204) 945-2896.

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FOREWORD

A. Terms of Reference

"The Dower Act" was referred to the Commission for review by the then Attorney-General as a consequence of the enactment, in October 1978, of "The Marital Property Act" and "The Family Maintenance Act".[1] This package of family law reform legislation effected fundamental reform and substantially changed the framework for determining the proprietary rights between spouses.

A few changes were made to "The Dower Act" to coincide with the passage of this legislation.[2] No comprehensive review of "The Dower Act" was made at that time; in particular, no thorough study was undertaken to examine what relationship, if any, should exist between the rights and protections contained in "The Dower Act" and those created by "The Marital Property Act".[3] In spite of its original role as part of the law of succession, dower has now become intertwined with the reform of marital property law.[4] It is the purpose of this Report to assess whether statutory reform of "The Dower Act" is called for and, if so, to propose recommendations for its reform.

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[1] "The Dower Act", C.C.S.M. c. D100; "The Marital Property Act", C.C.S.M. c. M45; "The Family Maintenance Act", C.C.S.M. c. F20.

[2] An Act to Amend Various Acts Relating to Marital Property, S.M. 1977-78, c. 27. The pertinent amendments to "The Dower Act" came into force on July 20, 1978. Simply stated, this Act increased the survivor's share of the deceased's net estate to one-half from one-third and required the surviving spouse to account for any benefit received pursuant to the new "Marital Property Act". The monetary sums in section 16 of "The Dower Act" were all increased to their present levels as shown in Appendix A. The preferential share of the survivor on an intestacy under subsection 6(1) of "The Devolution of Estates Act", C.C.S.M. c. D70, was also increased to the sum of $50,000 from $10,000.

[3] In Westward Farms Ltd. v. Cadieux (1983), 16 Man. R. (2d) 219 at 230 (C.A.) Matas J.A. comments as follows: "We can take judicial notice that the law of property as it affects spouses was changed after spirited public debate by the *Marital Property Act*, C.C.S.M., c. M45. Although important changes were made to spousal property rights, the provisions of the *Dower Act* were left untouched."

B. Overview of "The Dower Act"

Simply stated, the main object of "The Dower Act" is to provide some measure of economic security to spouses by ensuring that on death the surviving spouse will receive some share of the predeceasing spouse's estate, and by protecting the family home from arbitrary disposition or encumbrance during their lifetime. To achieve these objects, "The Dower Act" provides, in brief, the following rights:

(1) The surviving spouse is afforded the right to elect a fixed share of the deceased's net estate where the will fails to make the minimum provision as set out in section 15.

(2) A life estate in the deceased spouse's homestead[5] is provided to the surviving spouse for the duration of his/her life.

(3) A veto power over any disposition of the homestead may be exercised by the non-owning spouse.

In this Report we shall examine each of these rights in turn. At issue with respect to the fixed share is whether such a scheme is the fairest and most appropriate means of adjusting the economic position of the spouses when the marriage is terminated by the death of a spouse. With respect to the life estate, we shall assess whether there is a need to continue the preservation of the family home for the benefit of the surviving spouse upon the death of the owner spouse. The scope of the homestead definition will also be explored. As well, consideration will be given as to whether any exemption should be accorded to the surviving spouse's life interest in the homestead free from the claims of estate creditors. The statutory provisions which attempt to preclude the improper disposition of the homestead during a spouse's lifetime will be reviewed to determine whether reform is necessary and the nature of such reform. Finally, the effect of non-compliance with these statutory requirements will be explored.

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[4] Because "The Dower Act" existed before "The Marital Property Act", "The Dower Act" was not drafted with the intent that it should complement "The Marital Property Act".

[5] We discuss the scope of the definition of "homestead" in greater detail in Chapter 5.

It should be noted at the onset that this Report does not purport to be a comprehensive review of all aspects of the law relating to succession. It is confined to an examination of "The Dower Act". We have, however, through the course of our study, identified a number of shortcomings in "The Testators Family Maintenance Act" and "The Devolution of Estates Act".[6] Nevertheless, we believe that it would be inappropriate to make proposals with respect to reform of either of these Acts as both embrace vast subject areas which are clearly beyond the scope of the present Report. Rather than delay this Report by further review of these statutes, it would be preferable to give these enactments separate consideration. It is contemplated that a separate report examining these Acts will issue with appropriate recommendations for reform.

C. Terminology

We have found it convenient to employ certain terms in this Report and a brief note on their intended meaning is appropriate.

fixed share	We use this term to describe the surviving spouse's entitlement to a fixed portion of the estate of the deceased spouse as set forth in s. 15 of "The Dower Act". The equivalent right in other jurisdictions is also referred to as "elective right", "forced share" or "compulsory portion".
deferred sharing	This term is employed to describe the scheme for sharing property under "The Marital Property Act".

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[6] "The Testators Family Maintenance Act", C.C.S.M. c. T50; "The Devolution of Estates Act", C.C.S.M. c. D70.

	During marriage, each spouse is free to acquire and dispose of his or her own separate property, subject to certain safeguards. In an accounting during the spouses' joint lives, those property acquisitions of each spouse which are derived from the efforts of the spouses during the marriage are notionally pooled and there is a presumption of equal division.
balancing payment	The principle of sharing under "The Marital Property Act" is that the spouse with fewer assets has a money claim, known as an equalization claim or balancing payment, against the other spouse to equalize the value of the respective spouse's assets. We use these terms interchangeably throughout the Report.
marital property	This term refers only to those property acquisitions which are subject to sharing in an accounting under "The Marital Property Act".

D. Structure of the Report

The text of this Report is divided into two parts. Part I is devoted to a detailed examination of spousal property rights at the death of a spouse. The structure of Part I is as follows. Chapter 1 sets forth a brief historical background to dower at common law. We then detail the operation of Section 15 of "The Dower Act" today together with its interaction with three other pertinent statutory enactments. In Chapter 2, we assess both the merits and criticisms of the fixed share and set forth our reasons for concluding that reform is required. What then follows is an examination of what we consider to be the most appropriate option for reform. In Chapter 3, we put forward our specific recommendations for reform respecting the operation of a deferred sharing regime on death. Chapter 4 focuses on the need for and the appropriate restrictions upon the operation of an anti-avoidance scheme in an allocation of marital property both on death and during the spouses' joint lives.

In Part II of the Report attention turns to the balance of "The Dower Act" which generally sets forth the protections afforded to the family home or homestead. We review the measures which attempt to secure the spouses' rights in the homestead with a view to determining whether reform is necessary and the nature of such reform. In Chapter 5 specific proposals are developed for improving these protections.

E. Acknowledgments

The Commission wishes to record its gratitude to D. Trevor Anderson who participated in the deliberations on our final recommendations, but whose term as a Commissioner expired only shortly before the contents of this Report were finalized. His wealth of experience, both practical and academic, was of invaluable assistance to us throughout the preparation of this Report.

The Commission also wishes to acknowledge the cooperation and assistance it received from Mr. M.M. Colquhoun, Registrar General of Manitoba and Mr. C.A. Evans, Deputy Registrar General and District Registrar (Winnipeg) in preparing Part II of this Report, An Examination of the Homestead Protections.

PART ONE: SPOUSAL PROPERTY RIGHTS ON DEATH

CHAPTER 1

THE FIXED SHARE

In order to provide a background against which the emergence of "The Dower Act" can be seen in perspective, a brief examination of dower as it evolved at common law and of the statutory modifications to dower is set out in this Chapter. This examination is simply intended to review some of the fundamental concepts and salient features of the law of dower. The balance of this Chapter outlines the operation of the present fixed share under s. 15 of "The Dower Act" and its relationship to other statutory provisions.

A. Historical Perspective

1. Common law

From very early times, English law afforded a widow specific rights in her husband's estate. The precise outline of dower's history at common law is obscure. It antedates the Norman Conquest in 1066 and its first beginnings are lost in the dim antiquities of the law which prevailed in England before the Conquest. Dower was, however, recognized in the "Magna Carta" granted in 1215, and it was clearly defined and firmly established in charters thereafter. It is from this point that we shall begin our examination.[7]

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[7] For an account of the origin and development of common law dower, see G.L. Haskins, "The Development of Common Law Dower" (1948), 62 Harv. L. Rev. 42.

A good authority for the tracing of the law of dower in Manitoba is the judgment of Mr. Justice Bergman delivered in the case of Crichton v. Zelenitsky, [1946] 2 W.W.R. 209 at 228 (Man. C.A.).

Common law dower provided the wife with a measure of economic protection at a time when she was unlikely to own any property in her own right and when she could not inherit from her husband by way of will or on intestacy.[8] Land was the chief source of subsistence at that time; unless a widow had some rights in the lands of her husband she would frequently have been left destitute on his death. The primary purpose of common law dower was to provide a form of maintenance protection to the widow, and through her, support for the deceased's young children. In essence, the dower estate simply continued the husband's obligation to support his family after death.[9]

The dower protection, as it finally evolved, was the right of a wife on surviving her husband to an estate for her life in a one-third part of the freehold estates of inheritance of which her husband had been solely seised at any time during the marriage.[10]

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[8] The powerful forces of feudalism together with the rule of primogeniture, which provided the eldest male child with the superior right to succeed to realty, made it unlikely that a woman would own any land in her own right. If she did, the husband became entitled to receive the rents and profits from all the wife's freehold estates.

It was not until the Statute of Wills, 32 Hen. VIII, c. 1 (1540), as amended in 1542, that a husband could devise land to his wife except for land held by military tenure, only two-thirds of which could be devised.

[9] This is evident in the nature of the right which provided the widow with support only during her lifetime and which gave her no proprietary rights of which she was free to dispose.

[10] Common law dower did not attach to personal property. From at least the 12th century, a man's goods were divided upon his death into three equal parts, one of which went to his children, another to his widow, and the third according to his will. If he died without leaving a widow or left a widow but no children, he could dispose of half by way of will. This scheme of succession to personalty persisted until abolished by statute in York in 1692, in Wales in 1696 and in London in 1724. See 3 Holdsworth, A History of English Law, (3rd ed. 1923) 552. By the 18th century, testamentary freedom with respect to personalty prevailed throughout England.

This dower right, having once attached to the lands, adhered to them notwithstanding any sale or devise which the husband might make without the wife's formal consent. The dower right arose at the time of the marriage and existed as an inchoate interest until the husband's death, at which time it became consummated.[11] In an age when real property was the main source of wealth, common law dower admirably accomplished its primary purpose.

The husband had an equivalent estate: curtesy.[12] It was the right of the husband to an estate for his life in all the lands and hereditaments with which his wife was seised of an estate of inheritance, provided that issue had been born alive who were capable of inheriting the property from her. There were two important distinctions between dower and curtesy. The husband's estate existed in all of the wife's lands, not just a third; and it was conditional upon the birth of live issue capable of inheriting their mother's estate.

An inevitable consequence of dower was the hampering of the free alienation of land. It operated as a fetter on the inter vivos alienation of land because any conveyance of real property by the owner, usually the husband, during his lifetime, required the wife's consent. The possibility of a dower right being asserted at some future point clouded the chain of title conveyed by a married person. If the wife's consent was not obtained or lawfully dispensed with, she could claim possession in priority to those otherwise entitled. It was this very feature of interference with inter vivos dispositions which constituted the real strength of inchoate dower and it was the same feature which led to its ultimate defeat.

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[11] The effect of the consummation of her right was not to give her an estate in the land; this did not occur until her dower was actually assigned. The right of quarantine at common law was the right to remain in the chief house of her husband for 40 days after his death, within which period dower was to be assigned.

[12] For an account of the origin and development of this common law doctrine, see F.E. Farrer, "Tenant by the Curtesy of England" (1927), 43 L.Q.R. 87.

2. Statutory modifications

Significant social and economic changes were starting to take place in England, and dower gradually came into conflict with the burgeoning policy in favour of freedom of property alienation. Hence, the first dower act of England, which came into force in 1833, greatly modified the common law of dower and curtesy by restricting dower to the lands of which the husband had died seised rather than those of which he had been seised at any time during coverture.[13] The Act now empowered the husband to dispose of land without the wife's consent; she was precluded from claiming dower in any land which her husband had devised to another in his will or conveyed during his lifetime. Dower had now become an illusory protection in that it was contingent upon her spouse not depleting the estate by way of inter vivos transfer or by devising to others on death.

As of July 15, 1870, Manitoba received the common law and statute law of England insofar as it was applicable to her circumstances. Thus, it was this modified statutory law of dower which was first introduced in Manitoba and was the law here until July 1, 1885. In that year the first Real Property Act[14] was before the Legislature and it was perceived that the woman's inchoate right to dower in the lands of her husband would be contrary to the spirit and aim of the Torrens land titles system.[15] Consequently, "The Real Property Act", by s. 24, declared that no widow or widower was entitled to either dower or curtesy, respectively, in the real property of his/her deceased spouse.[16]

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[13] The Dower Act, 1833, 3 & 4 Will. IV, c. 105. In 1925, both dower and curtesy were formally abolished in England by The Law of Property Act, 1925, 15 & 16 Geo. V, c. 20.

Prior to the passage of the first statutory provision respecting dower in England, an unexpected result arose as a consequence of the enactment in 1535 of the Statute of Uses, 27 Hen. VIII, c. 10. Conveyancers employed the statute as a method of defeating the right to dower. See A.D. Armour, "Grants to Uses to Defeat Dower" (1925), 3 Can. B. Rev. 593.

[14] "The Real Property Act", S.M. 1885, c. 28.

The importance of common law dower had been declining in any event. The transition from a predominantly rural to a predominantly urban society, coupled with the fact that new forms of wealth other than realty constituted the bulk of most husbands' estates, meant that common law dower could no longer be a viable means of continuing the support obligation. The failure of common law dower to account for these changing patterns of wealth gave impetus to the movement for statutory modifications of the protection afforded to a surviving spouse.

3. "The Dower Act" of Manitoba

During the period between July 1, 1885, when section 24 of "The Real Property Act" came into force, until the passing of "The Dower Act" in 1918,[17] there was no right of dower existing in Manitoba. Without a doubt, the Act imported many changes to the old common law of dower and curtesy. It was unique in that both husbands and wives were afforded identical benefits. Specifically, the survivior was entitled to a fixed share of one-third of the deceased's estate, both real and personal. The fixed share enlarged the survivor's interest from a life estate to one which was absolute. The inclusion of personalty expanded the survivor's claim to the deceased's wealth. Unlike common law dower, which attached to all real property owned by the husband during his life, the fixed share applied only to property the husband owned at death.

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[15] Simply stated, the aim of the Torrens system is to ensure that the land described in a Certificate of Title is subject only to those rights and encumbrances which are set out on the title itself. The existence of common law dower was generally considered inconsistent with a land registration system for it imposed an invisible encumbrance on title.

[16] "The Law of Property Act", C.C.S.M. c. L90, now houses these amendments in section 9 and section 10.

[17] "The Dower Act", S.M. 1918, c. 21.

The first Dower Act also imported the American concept of homestead protection which was unknown at common law. Briefly stated, the homestead protection under "The Dower Act" provided that there could be no sale, lease, mortgage or other disposition of the family home, called the homestead, without the consent of the non-title-holding spouse. It also entitled the surviving spouse to a life estate in the homestead.

With the enactment of the fixed share, there was the recognition that in the field of succession, social interests other than complete testamentary freedom warranted consideration; that is, the fixed share recognized a competing interest - the right of the survivor to share in the estate of the deceased spouse. While "The Dower Act" has been amended on a number of occasions since 1918, its substantive provisions have remained largely unchanged.[18]

It is noteworthy that before Manitoba's Dower Act came into force both Alberta and Saskatchewan had embodied forced share principles in legislation.[19] These Acts, however, were only available for the benefit of the widow. Both schemes simply allowed the widow the right to seek a greater share in the testator's estate if by her husband's will, she received less than she would have done, had he died intestate. Although the legislation appeared to have provided the Alberta courts with a broad statutory discretion to award the widow a just and equitable allowance from the estate, this provision was interpreted restrictively so that the maximum award was held to be that which she would have received on an intestacy.[20] Where the circumstances rendered it just and equitable to do so, the court could give her less; it could not give her more. The Saskatchewan provisions seem to have been clearer. The court had but two options: it could give the widow that which she would have received if her husband died intestate leaving a widow and children or dismiss her application.

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[18] "The Dower Act", S.M. 1918, c. 21 as am. S.M. 1919, c. 26; S.M. 1921, c. 15; S.M. 1922, c. 4; S.M. 1923, c. 8; S.M. 1926, c. 10; S.M. 1927, c. 6; S.M. 1940 (2d), c. 12; S.M. 1941-42, c. 12; S.M. 1945 (1st), c. 13; S.M. 1949, c. 12; S.M. 1951, c. 16; S.M. 1952 (1st), c. 15; S.M. 1958 (1st), c. 67; S.M. 1960, c. 10; S.M. 1961 (1st), c. 53; S.M. 1964 (1st) c. 16; S.M. 1971, c. 82; S.M. 1974, c. 59; S.M. 1976, c. 69; S.M. 1977, c. 53; S.M. 1978, c. 27; S.M. 1979, c. 28; S.M. 1980-81, c. 38. The last major updating and revision of "The Dower Act" took place in 1964 as a result of the recommendations made by the Law Reform Committee of Manitoba. No new principles were introduced at that time, however.

[19] The Married Women's Relief Act, S.A. 1910, 2nd Sess., c. 18, ss. 2 and 8; The Devolution of Estates Act, S.S. 1910-11, c. 13, s. 11(a) and (g).

However, with the advent of dependants' relief legislation, both Alberta and Saskatchewan abandoned the forced share principle. It would seem that the retention of these statutes was no longer thought justified as it was perceived that the widow was afforded adequate protection under the new dependants' relief legislation.[21]

Today, Manitoba's position is unique in Canada. We are the only province which provides the surviving spouse with a fixed share of the deceased's estate on death.[22] This is a significant difference in Manitoba's law from that of the other provinces.[23]

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[20] *McBratney* v. *McBratney* (1919), 59 S.C.R. 550.

[21] *See* G. Bale, "Limitation on Testamentary Disposition in Canada" (1964) 42 Can. B. Rev. 367 at 372.

[22] In addition, we have adopted a discretionary approach under "The Testators Family Maintenance Act" for dependants of the deceased in order to seek further provision for their proper maintenance and support. We discuss this in greater detail at page 16.

[23] The relatively recent introduction of marital property legislation in all of the eastern provinces has since repealed dower at common law. *See* *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 70; *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 49(1) and (2); *Matrimonial Property Act*, S.N.S. 1980, c. 9, ss. 33 et seq.; *Family Law Reform Act*, S.P.E.I. 1978, c. 6, s. 62(1) et seq.

B. An Examination of the Operation of the Fixed Share Today

Having reviewed in brief the historical background, we now look to the specific operation of the fixed share. In order to assess its adequacy, a detailed examination of its operation is required.[24] It soon becomes apparent that the seeming simplicity of the statutory scheme belies its complexity.

When a marriage is terminated by the death of a spouse the survivor's right to share in the deceased spouse's estate differs depending upon whether the deceased leaves a will or dies wholly intestate. If a spouse dies without having made a valid will (i.e. intestate), the fixed share under "The Dower Act" has no application; the survivor's share in the deceased spouse's estate is determined in accordance with the provisions of "The Devolution of Estates Act".[25] We examine the provisions of "The Devolution of Estates Act" in greater detail later in this Chapter.

When a spouse dies leaving a will, which fails to provide the surviving spouse with one-half of the deceased's net real and personal property, that spouse may be entitled to assert fixed proprietary rights in the estate of the deceased. Quite simply stated, the surviving spouse has the power of electing to take under the will or to receive one-half of the deceased's net estate.[26] It is only a statutory right to a one-half share of the deceased's net estate; it is not a charge against specific estate assets. By section 21 of the Act, the survivor's share is to be considered and construed as a debt of the deceased as of the date of his/her death. As such, it may bear interest at the appropriate rate of interest from one month after the date of election to payment.[27]

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[24] In setting out its operation, we have drawn on an excellent discussion by A.D. Hughes, in "Reform of The Dower Act Rights of Widows" (1979), 9 Man. L.J. 393.

[25] Sysiuk v. Sysiuk, [1948] 1 D.L.R. 676 (Man. C.A.).

[26] This power of election is in addition to the surviving spouse's life estate in the predeceasing spouse's homestead.

1. The formula

In order to assess the merit of an election, the survivor must first determine the value of the fixed share and compare it to the benefits, if any, conferred by the deceased's will. It is only where the fixed share exceeds the value of benefits conferred on the survivor by way of the will that the election can be exercised beneficially; the effect of the survivor's election is to render void all benefits conferred on the survivor by way of the deceased's will.[28] The "elective" nature of this right then is the choice of the surviving spouse to accept the provisions made by the deceased's will, if any, or to take the amount "determined" by statute.

The fixed share of the deceased's estate is calculated in accordance with section 15(1) of "The Dower Act" which provides as follows:

> 15(1) Notwithstanding anything contained in The Wills Act, the widow of every testator who by his will has not left her property or otherwise provided for her to the value of at least one-half of the value of his net real and personal property, is entitled to receive from his executor such share of his net real and personal property as, together with all moneys paid or payable under or by virtue of any insurance policies on the life of the testator to her or for her benefit and for her own use, and together with any property owned at the time of the testator's death by her for her own use or then held in trust for her, and which is property (or the proceeds or investments of property) which the testator had during his life after marriage conveyed to her or for her benefit as a gift or by way of

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[27] See Morgan v. Altman (1961), 34 W.W.R. 452 (Man. Q.B.); Re Williams Estate (1983), 21 Man. R. (2d) 157 (Surr. Ct.).

[28] "The Dower Act", C.C.S.M. c. D100, s. 19. There is one exception, however. Where a spouse by will has made a declaration or appropriation, under "The Insurance Act", of a policy of insurance on his/her life for the benefit of his/her spouse, notwithstanding an election, the surviving spouse is entitled to receive the insurance monies.

> advancement, and together with any benefit that the widow had received from the testator during his life under "The Marital Property Act" or had become entitled to receive from the testator by virtue of a division of assets made during his life under "The Marital Property Act", shall equal in value one-half of the testator's net estate, and in addition, is entitled to the life estate of her husband's homestead under the provisions of this Act hereinbefore set out.[29]

From this section the following formula emerges:

$$\text{DOWER SHARE} = \frac{\text{NET ESTATE}}{2} - \left[\begin{array}[t]{l}\text{Any insurance}\\\text{proceeds on}\\\text{the life of}\\\text{the deceased}\\\text{spouse payable}\\\text{to the survivor}\end{array} + \begin{array}[t]{l}\text{Any post-nuptial}\\\text{benefit received}\\\text{by way of gift}\\\text{or advancement}\end{array} + \begin{array}[t]{l}\text{Any benefit}\\\text{received by}\\\text{the survivor}\\\text{pursuant to}\\\text{The Marital}\\\text{Property Act}\end{array}\right]$$

This section effectively brings about distinctive and separate rules for the sharing of property for marriages terminated by death than for marriages terminated during the lives of the spouses. A rather complicating feature is that this calculation is determined by employing two points of reference, namely, the deceased's net real and personal property and the deceased's net estate. In essence, the section provides: if the deceased has not left you \$X (1/2 net real and personal property), you may claim \$Y (1/2 net estate), when \$X may be greater or less than \$Y, depending on the circumstances.[30]

(a) Net estate

The primary concept is that of the testator's net estate, defined in s. 1(h) of "The Dower Act" to comprise the following:

(a) all net real and personal property of the testator;

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[29] It should be borne in mind throughout that the Act applies equally in favour of a husband and wife. All references to the words "widow", "her", "testator" and "husband" are interchangeable with the words "widower", "his", "testatrix" and "wife", respectively. See "The Dower Act", C.C.S.M. c. D100, s. 33(2).

[30] *Supra* n. 24 at 401-402.

(b) all monies paid or payable under insurance policies on the life of the testator to the benefit of the wife or child of the testator;

(c) any property at the time of the testator's death owned by the wife or held in trust for her and which is property that the testator had during his life after marriage conveyed to the wife as a gift or by way of advancement.

With respect to paragraph (a), in ascertaining and computing the value of the net real and personal property, values of unrealized assets and securities should be very conservative.[31] The general practice is to value the specific assets as at the date of death.[32] Clause 2(i) of "The Dower Act" which defines "net real and personal property" ensures that creditors of the deceased spouse have priority over the survivor's fixed share. It is only after all debts, funeral and other testamentary expenses have been paid or taken into account that the survivor is entitled to any benefits under the Act.

(b) Deductible receipts

The deceased's net estate is then divided in half and from this quotient the survivor must then "account for" and deduct the following receipts:

(a) all monies paid or payable under or by virtue of any insurance policies on the life of the testator to her or for her benefit and for her own use;

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[31] In Morice v. Davidson [1943] S.C.R. 94 it is made clear that no dower payment should be made on the basis of doubtful assets.

[32] Re Williams Estate, supra n. 27. There may, however, be cases where the court directs that the values to be used would be those found to exist on the final judgment of the application. See, for example, In Re Elder Estate, [1936] 2 W.W.R. 70 (Man. K.B.) where Donovan J. so directed because of the widow's delay in making her election.

(b) any property owned at the time of the testator's death by her for her own use or then held in trust for her, and which is property (or the proceeds or investments of property) which the testator had during his life after marriage conveyed to her for her benefit as a gift or by way of advancement;

(c) any benefit that the widow had received from the testator during his life under "The Marital Property Act" or that the widow had become entitled to receive from the testator by virtue of the division of assets made during his life under "The Marital Property Act".

(c) Illustration

The following three step process is required in order to calculate the fixed share:

Step One:	Determine the value of the deceased's net estate
Step Two:	Determine whether there are any deductible receipts to be accounted for by the surviving spouse
Step Three:	Compute the fixed share by employing the following equation: Dower Share = $\frac{\text{Net Estate}}{2}$ - [Deductible Receipts]

We hope that the following illustration will help to clarify the operation of the Act.[33]

> Testator leaves net real and personal property worth $80,000. He has two insurance policies on his life, one totalling $15,000 payable to his widow and another totalling $30,000 payable to his children. His widow owns property worth $5,000 which the testator had conveyed to her during the marriage, but there has been no division of assets under "The Marital Property Act". The value of the testator's NET ESTATE is:

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[33] Further illustrations are set out in A.D. Hughes' article supra n. 24, at 400-401. In each instance it is assumed that a valid will is in existence and that s. 16 of "The Dower Act" does not apply.

$ 80,000	Net Real and Personal Property
15,000	Insurance Proceeds (wife)
30,000	Insurance Proceeds (children)
5,000	Post-Nuptial Gifts
$130,000	

The value of benefits which the survivor must account for is:

Insurance	$15,000
Post-Nuptial Gifts	5,000
Total	$20,000

The Fixed Share is as follows:

$$\frac{\text{Net Estate}}{2} - [\text{Survivor's Insurance Proceeds} + \text{Post-Nuptial Gifts} + \text{Marital Property Act Benefits}]$$

$$\frac{130{,}000}{2} - [15{,}000 + 5{,}000]$$

$$\$65{,}000 - 20{,}000 = \underline{\$45{,}000}$$

If the deceased spouse had not provided for the survivor to the extent of one-half of the net real and personal property ($40,000), the surviving spouse would be entitled to a fixed share of $45,000 in lieu of benefits, if any, conferred by way of will. The operation of the section, however, produces the incongruous result that if the will provides at least $40,000 to the survivor no right of election arises even though the fixed share would be $5,000 more.

(2) Barring the fixed share

By virtue of section 16 of the Act the deceased spouse can, however, preclude an election by the survivor. The section sets forth a legal base for the counselling of spouses who want to draw wills which are immune from invalidation by the exercise of the fixed share. In particular, the provision of an annual income of not less than $15,000, or property of not less than $250,000 over and above any encumbrances; or an annual income of $10,000 together with property of not less than $150,000 over and above any encumbrances, for the benefit of the survivor will preclude an election.[34]

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[34] This detailed statutory provision is set forth in Appendix A.

There are then two methods that the deceased spouse may employ to avoid the fixed share, namely:

(a) the provision of property to the value of one-half of the deceased's net real and personal property or,

(b) the provision of an annual income or capital sum in accordance with the amounts set forth in s. 16 of the Act.

One further section of "The Dower Act" requires mention at this juncture because it plays a very decisive role in disentitling a surviving spouse to the fixed share. Section 22 of the Act provides as follows:

> Where the wife at the time of her husband's death had left her husband with the intention of living separate and apart from him, she has no right under this Act either to a life estate in the homestead or to any share in her husband's estate unless a judge of the Surrogate Court, on application made to him, otherwise directs by order.

This has been judicially interpreted to mean that if the surviving spouse has deserted or abandoned the deceased spouse without reasonable or just cause then (s)he will be taken to have forfeited both the fixed share and the life estate in the homestead.[35] However, where a person has been compelled by the cruelty of his/her spouse to separate, (s)he cannot be said to have been living separate and apart within the meaning of s. 22 of "The Dower Act".[36] Similarly, where the spouses are living separate and apart pursuant to a mutual separation agreement, there is no loss of either right afforded under "The Dower Act".[37] A divorced spouse has no right to elect a fixed share in the estate of his/her former spouse.

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[35] See, for example, In Re Lenius, [1923] 1 W.W.R. 272 (Man. C.A.); Re Jacob, Cockburn v. Jacob (1965), 52 D.L.R. (2d) 442 (Man. C.A.); Re Haddad, [1978] 5 W.W.R. 117 (Man. Surr. Ct.).

[36] Monchamp v. Monchamp (1952), 8 W.W.R. (N.S.) 366 (Man. C.A.).

[37] See, for example, In Re Lenius, supra n. 35; Hall v. Neff (1953) 8 W.W.R. (N.S.), 380 (Man. Q.B.).

C. Interaction Between "The Dower Act" and Other Statutes

Apart from "The Dower Act", there are three additional statutes which may govern the survivor's rights to the deceased's estate. These are "The Devolution of Estates Act", "The Testators Family Maintenance Act" and "The Marital Property Act". A brief consideration of each statute and its interaction with "The Dower Act" follows.

1. "The Devolution of Estates Act"

Human nature being what it is, some never see to the execution of a will. In the absence of a valid will, "The Devolution of Estates Act" provides for the distribution of the deceased's estate. Section 15 of "The Dower Act" has no application in the event that the deceased spouse has died wholly intestate.[38]

"The Devolution of Estates Act", in effect, is a statutory will made by the Legislature which attempts to approximate what a spouse would ordinarily have provided for by will, if one had been made. Its aim is to reflect the collective view of the community as to what would be fair and equitable.

The Act provides that if the intestate dies leaving a surviving spouse but no issue the entire estate goes to the survivor after payment of all debts, liabilities and funeral expenses.[39] If there is issue, the surviving spouse then has a first charge upon the estate to the value of $50,000 and to one-half the residue after deducting the first $50,000.[40] That is, the spouse's share of the residue is one-half, irrespective of how many children survive the deceased spouse. Thus, in the event of a modest estate, most of it will be transferred to the surviving spouse and if the estate is large, the deceased spouse's children will share in it. A divorced spouse is not entitled to the intestate portion of the estate of a former spouse.

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[38] Where the predeceasing spouse has died wholly intestate, the surviving spouse is, however, still entitled to a life estate in the deceased's homestead, in addition to any benefits received under "The Devolution of Estates Act". See Sysiuk v. Sysiuk, supra n. 25.

[39] "The Devolution of Estates Act", C.C.S.M. c. D70, s. 7.

2. "The Testators Family Maintenance Act"

"The Testators Family Maintenance Act" applies whether the deceased died testate or intestate. The foundation of the jurisdiction to make an order under this Act is the failure of the deceased spouse to provide "adequate provision for the proper maintenance and support" of a dependant.[41] Whether or not adequate provision has been made for a dependant is determined by reference to a variety of factors which include, *inter alia*, the size of the estate, the help of the applicant in amassing the estate, the strength of competing claims, the prior standard of living and the character and conduct of the applicant. Where the court finds that the deceased has failed to provide adequately for his/her family , it may order that a lump sum or periodic payments be made for the benefit of the applicant and this order may be varied by a subsequent order.[42]

"The Testators Family Maintenance Act" is essentially intended to be a support statute based upon the need of the applicant. The legislation is society's response to the possibility that a person might use his/her freedom of testation to leave dependants in needy circumstances. Its function is to transfer the legal lifetime support obligation of the deceased spouse to the deceased's estate where the dependant is in need; it was not enacted with the aim of assuring dependants of a fair share of the estate.[43] The Act provides a further avenue for a surviving spouse and other dependants to pursue in order to supplement any fixed share under "The Dower Act" or the provisions under "The Devolution of Estates Act" or simply to supplement the benefits, if any, conferred by way of will, provided the need of the applicant so warrants.[44]

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[40] "The Devolution of Estates Act", C.C.S.M. c. D70, s. 6(1), 6(2).

[41] A dependant is defined to include the deceased's surviving spouse or child.

[42] "The Testators Family Maintenance Act", C.C.S.M. c. T50, s. 6(3) and 7.

The objective of this Act has since been displaced, however, and substantial inroads have been made into the principle of testamentary freedom. "Need", through judicial interpretation, has proven to be a very flexible concept and has not been limited to need in the sense of financial deprivation or hardship.[45] Able-bodied adult children appear to have fared well under "The Testators Family Maintenance Act".[46]

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[43] See In Re Lawther Estate, [1947] 1 W.W.R. 577 at 593 (Man. K.B.) where Williams, C.J.K.B. comments that the purpose of the Act is to provide maintenance and not to permit the accumulation of an estate; Sloane v. Bartley (1980), 7 Man. R. (2d) 222 at 230 (Man. C.A.): "The Act was not intended to authorize a court to rewrite a new will for a testator."

[44] See In Re Blackmore Estate, [1948] 1 W.W.R. 1001 at 1010 (Man. K.B.), Williams, C.J.K.B. made the following comments respecting the role of "The Testators Family Maintenance Act" when the survivor's share was determined in accordance with "The Dower Act":

> . . . [I]t is only necessary to say that the two Acts were passed for entirely different reasons. "The Dower Act", first passed in 1918, was passed to assure to the widow a life estate in the homestead, if any, and one-third [now one-half] of the estate. "The Testators Family Maintenance Act", first passed in 1946, was to provide, in a proper case, that dependants, including the widow, should receive proper maintenance and support.
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> A widow taking under "The Dower Act" might get far less than proper maintenance and support . . . . In such circumstances the widow may resort to "The Testators Family Maintenance Act" and, if entitled, obtain relief even if the whole estate is required for that purpose.

Quite apart from this larger concern, there remains one particular section under "The Testators Family Maintenance Act" which has caused the court much difficulty. Subsection 22(2) of "The Testators Family Maintenance Act" provides that if the surviving spouse should first apply under that Act rather than first seek a fixed share of the deceased's estate, (s)he has no further right to elect under "The Dower Act". Benefits given to a dependant spouse by an order under the Act are in lieu of the share given under "The Dower Act".

Much confusion and uncertainty surrounds the question as to whether the court must award the applicant spouse at least that which (s)he would have been entitled to under "The Dower Act". We set forth the case law which has considered this section at p. 86. It would seem that much of the difficulty encountered stems from the problem noted earlier, namely, that in light of judicial interpretation the intended object of the Act is now unclear. For purposes of the present discussion, it may suffice to say that in our view adequate provision for the proper maintenance and support of the surviving spouse is not the same as fixed proprietary rights in the deceased's estate. It would appear that this section attempts to equate these two distinct, though related concepts.

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[45] See, for example, Barr v. Barr (1972), 25 D.L.R. (3d) 401 at 410 (Man. C.A.) where Dickson J.A. (as he then was) stated that:

> The dominant theme running through the cases, and they are myriad, is one of ethics, even more than economics. Although the Testators Family Maintenance Act is couched in terms which at first impression appear to be pragmatic and economic, 'adequate provision . . . for proper maintenance and support', it soon becomes apparent on a review of the authorities that heavy emphasis is placed upon the moral aspects of the problem.
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> . . . .
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> . . . [T]he courts have consistently refused to limit the scope of the legislation to persons who were left, at the death of the testator, in actual want. It is plain since the judgment of the Privy Council in Bosch v. Perpetual Trustee Co., [[1938] A.C. 463 (P.C.)], that the prime purpose of the Act is to enforce a moral duty to make adequate provision for the proper maintenance and support of dependants.

See also Re Bartel Estate (1982), 16 Man. R. (2d) 29 (Q.B.).

[46] The cases in Canada and abroad are extensively reviewed by the Manitoba Court of Appeal in Barr v. Barr, ibid., and in Sloane v. Bartley, supra n. 43.

3. "The Marital Property Act"

A deferred sharing regime is the scheme operative under "The Marital Property Act". The aim of the legislation is to achieve an equitable distribution of marital property on marriage breakdown, irrespective of which spouse actually owns the property. With the enactment of "The Marital Property Act", the Legislature has given recognition to the principle that property which has been acquired during marriage, in substance, should be regarded as having been secured by the joint effort and contribution of the husband and wife. Marriage is viewed, among other things, as an economic partnership of shared responsibilities of which each spouse is a member, equally contributing by his or her own industry to its prosperity, and each possessing an equal right to succeed to the marital property acquisitions after its dissolution.

Deferred sharing lies somewhere between the extremes of separate property, on the one hand, and full community of property, on the other. Each spouse remains free to deal with his/her property independently, subject only to certain safeguards required to protect the interests of the other spouse. When the Act is invoked it provides that certain property acquisitions of each spouse are to be shared and there is a *prima facie* presumption of an equal distribution of that property between the spouses. Generally speaking, equalization under the scheme is limited to property the spouses had acquired during the subsistence of the marriage. The characterization of an asset as either a family or commercial asset defines the extent of the court's discretionary power to vary the otherwise equal division.[47] The spouse with fewer shareable assets is entitled to a balancing payment from the other spouse for an amount sufficient to balance the value of the spouses' assets. This regime for the sharing of property differs significantly from that found in s. 15 of "The Dower Act".

"The Marital Property Act" has recently been amended so that the legislation is no longer confined to marriage breakdown. Section 12 provides that spouses each have the right upon application to have an accounting of assets.[48] However, subsection 24(2) of "The Marital Property Act" provides that all rights under that Act of a spouse who has rights under "The Dower Act" expire upon the death of the other spouse. In other words, "The Marital Property Act" would appear to be relevant after death only in those instances in which a spouse is disentitled under "The Dower Act". As we noted earlier, the surviving spouse who has deserted the deceased spouse without reasonable or just cause will be found to have forfeited his/her fixed share. In such a case, an application may be brought for an accounting of assets but this accounting must be commenced within six months from the date of death,by virtue of subsection 18(1) of "The Marital Property Act".

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[47] Section 13(1) of "The Marital Property Act" provides that a discretionary power may be employed to vary the equal division of family assets where it would be grossly unfair or unconscionable to order an equal allocation. In accordance with section 13(2) a discretionary power to vary the equal division of commercial assets may be invoked when an equal division of commercial assets would be clearly inequitable having regard to any circumstances that the court considers relevant. Subsection 13(2) sets forth eight specific factors to guide the court.

[48] In practice, however, it is likely that marriage breakdown will often prompt the application for an allocation of property.

CHAPTER 2

ASSESSMENT OF THE FIXED SHARE

It is the purpose of this Chapter to assess both the merits and the criticisms of the fixed share. The balance of the Chapter is devoted to an examination of the options for reform and sets forth our determination of the most appropriate solution.

A. MERITS OF THE PRESENT LAW

The rigours of a separate property regime have been ameliorated by the availability of the fixed share on death. To the extent that "The Dower Act" has afforded the surviving spouse with fixed proprietary rights in the estate of the deceased spouse, it has served its purpose fairly well as the surviving spouse has had a good measure of certainty and security. It has left spouses free to modify the fixed share as they wish by contracting out.[49] Unlike both dower and curtesy at common law, the fixed share has afforded identical benefits to both men and women. A further advantageous feature of the fixed share under "The Dower Act" has been that, in most instances where the estate is not complex, the personal representative of the deceased spouse has been able to determine the survivor's share and to pay same without resort to a court application.

B. CRITICISMS OF THE PRESENT LAW

The Commission is of the view, however, that the passage of time since "The Dower Act"'s inception in 1918, coupled with recent developments in the law of marital property, have brought to light some deficiencies in the original legislation. These deficiencies can fairly be divided into two classifications: namely, those defects which are of a conceptual nature, and those defects of a technical nature which have rendered the law unsatisfactory and confused. The root of some of the conceptual deficiencies arises due to the disparity between marital property legislation and dower legislation. The general issue to be determined is whether or not the principles governing a post-death distribution of property under "The Dower Act" and those governing a pre-death distribution of property under "The Marital Property Act" should be more consonant. The key inquiry is whether there is any functional reason why a distribution at death should be so widely different from that accompanying marriage breakdown during the spouses' joint lives. We turn now to examine first the conceptual deficiencies and then to set forth the technical deficiencies.

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[49] "The Dower Act", C.C.S.M. c. D100, s. 23.

1. Conceptual deficiencies

(a) Unfair distribution

One of the main criticisms of "The Dower Act" is the method of calculating or determining the survivor's share of the deceased spouse's estate. The Commission has concluded that the manner in which the fixed share is calculated may cause an unfair allocation of property. We have reached this conclusion for principally three reasons.

First, the fixed share makes no distinction as to how property is acquired. The surviving spouse is entitled to share in all of the assets which form part of the deceased's net estate; the source of the property of the predeceasing spouse is immaterial. The fixed share applies indifferently to property acquired during the marriage, property acquired by gift and property owned at the inception of the marriage.

The inequities which ensue as a consequence of the failure of the fixed share to recognize the source of property are graphically illustrated in the case of Re Williams Estate.[50]

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[50] (1983), 21 Man. R. (2d) 157 (Surr. Ct.)

A wife who had been separated from her husband for 33 years, elected to take under "The Dower Act", rather than under the will of her late husband.[51] Included in his estate was the residue of the estate of his late common-law wife. Thus, the surviving spouse was entitled to one-half of the assets, originating in the estate of a stranger to herself, in addition to one-half of the assets accumulated by the deceased throughout the 33 years of separation. It is our view that the failure of the fixed share to recognize the time and manner of acquisition of the deceased's estate may provide the surviving spouse with a windfall unrelated to the married life of the spouses.

Furthermore, the failure of the fixed share to recognize the source of the predeceasing spouse's property compounds the complicated family relationships resulting from remarriage. In recent years there has been a dramatic increase in the divorce rate.[52] For present purposes, the significance of the divorce rate lies not in the figures per se, but in the high rate of remarriage. There has been a marked increase in the frequency of remarriage in the case of divorced persons.[53] Hence, a substantial number of spouses die leaving a surviving spouse and surviving issue from a previous marriage. It appears that the natural inclination of a remarried spouse with a relatively small estate is to give at least a portion, if not the bulk of the estate to the children of the first marriage.[54] The fixed share, however, arbitrarily awards the surviving spouse of the second marriage a one-half share of the deceased spouse's capital even though a portion or the bulk of it may have been amassed during the course of the predeceasing spouse's first marriage. Simply stated, we are concerned that the surviving spouse may be too generously treated by the present law, to the prejudice of children from a first marriage. By contrast, under "The Marital Property Act", generally speaking, the only estate which is shareable with a spouse in an accounting during the spouses' joint lives is that which has been amassed by both spouses during the marriage.

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[51] In an earlier hearing it had been held that the widow had the right to elect as she had not left her husband with the intention of living separate and apart within the meaning of s. 23 of "The Dower Act".

[52] Between 1968 and 1982, the national divorce rate rose by 520%. Nearly 40% of Canadian (first) marriages now end in divorce. There were 70,436 divorces granted by Canadian courts in 1982. This represented a rate of 2.9 divorces per 1,000 Canadians. See Statistics Canada - Marriages and Divorces, Vital Statistics, Volume 11, 1982.

[53] We are advised that 84% of all divorced men remarry after an average period of 5 years following the divorce. Fewer divorced women remarry - 75% - and they wait an average of 11.2 years before remarrying, ibid.

The second manner in which the fixed share may effect an unfair distribution is caused by its failure to take into account the survivor's own property acquisitions. Generally speaking, the fixed share imposes an interest without regard to the personal wealth which the survivor may have amassed during his/her life. Only those property acquisitions which were conferred by way of gift or advancement by the deceased are deducted in ascertaining the survivor's one-half share;[55] the survivor's independent property accumulations are irrelevant. This is so despite the fact that the deceased spouse is required to share all of his/her property, regardless of the time and manner of acquisition, with the survivor.

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[54] There would appear to be a number of cogent reasons which support this testamentary pattern. First, if any of the surviving issue are minors, the deceased will usually wish to provide monies for their education and support as the surviving spouse may well not have custody of these children. Second, where all the surviving issue are adults, the deceased will likely wish to ensure that a generous portion of his estate goes to his issue, as he cannot simply assume that any of his issue would necessarily inherit on the surviving spouse's death. Third, in most instances, parties to a second marriage will be older at the time of that marriage; the surviving spouse may well have been self-supporting for a good number of years, and the deceased may feel that his obligations to both his surviving spouse and surviving issue are roughly equal. See Uniform Law Conference of Canada, Proceedings of the Sixty-Fifth Annual Meeting, Report on the Uniform Intestate Succession Act, 1983, at 221.

The following example illustrates our concern. Assume Mr. and Mrs. Jones have been married for ten years and their assets are comprised of the following:

Husband's separate property		Wife's separate property	
Family home	$120,000	Inheritance	$18,000
Cottage	40,000		
Art collection	$25,000		
Investments	7,000		

The family home, cottage, art collection and investments are all assets acquired during the marriage. Mrs. Jones executes a will leaving her money, which she has earlier inherited, to a charitable organization which she favours. Should Mr. Jones survive his wife, his fixed share would entitle him to one-half of Mrs. Jones' sole asset, or $9,000 of the inheritance, even though his assets greatly exceed those of the deceased. By failing to account for the survivor's own marital property, we believe that the predeceasing spouse's freedom of testation is encroached upon to a greater extent than is necessary to achieve a fair share of the estate for the survivor.

Finally, the fixed share may be characterized as an inequitable formula due to its inability to recognize and account for the length of the spouses' marriage. That is, the fixed share favours the spouse who survives a marriage begun later in life or a marriage of very short duration. The successful "fortune hunter" for whom marriage is a means of financial advancement and who is married to the predeceasing spouse but for six months is treated no differently from the spouse of forty years who has likely contributed much more to the success of the marriage, economically and otherwise. The Commission has concluded that this may often result in an unfair and inequitable distribution of the deceased's estate.

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[55] As well, where there has been an earlier division of assets during the spouses' joint lives, that property acquired by the surviving spouse and now forming part of the survivor's own property acquisitions must be accounted for.

(b) Maintenance perspective

A further objection to the fixed share is that, in part, it is confined to maintenance protection for the surviving spouse. Section 16 of the Act arbitrarily defines monetary sums which would successfully eliminate any further entitlement of the survivor to share in the deceased spouse's estate.[56] The theory would appear to be that a deceased is taken to have adequately "provided for" the survivor by the provision of the defined sums of moneys set forth in section 16. In effect, a form of unilateral contracting out of "The Dower Act" is conferred upon the predeceasing spouse.

It is the very retention of this partial maintenance perspective that leads to a most anomalous situation. In those instances where section 16 is applicable, a surviving partner of a marriage may not receive as large a share of property as a divorced/separated spouse is entitled to under a marital property accounting. Yet, one would assume that the equities of a spouse who has continued to cohabit with the other spouse until the latter's death should, as a general rule, be at least as strong as those of a spouse who separates or is divorced from the other. A further example will serve to illustrate this anomaly.

Assume Mr. Jones has assets consisting of the following:

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[56] This section is set out in Appendix A.

Family home	$185,000
Car	10,000
Bank account	5,000
Restaurant (sole proprietorship)	70,000
Cottage	30,000

Assume, also, that Mr. Jones has executed a will providing Mrs. Jones with an annual income of $15,000 during her life. Mr. Jones earns the family income. Mrs. Jones has given up her employment and earnings as a nurse and devoted her efforts to caring for the home and to looking after their four young children. She has no savings, or private income and cannot contribute in cash to the acquisition of property. On marriage breakdown, Mrs. Jones could assert a prima facie entitlement to an equal sharing of all the family and commercial assets, totalling $300,000, that is effectively a $150,000 entitlement. However, should Mrs. Jones survive her husband, she would not be entitled to her fixed share as it would be precluded by virtue of s. 16, that is, the provision of an annuity of $15,000 per year. Mrs. Jones, whose remaining years may be uncertain, has received no proprietary interest in the marital assets and her only recourse is to seek an application for increased support under "The Testators Family Maintenance Act".

Given that maintenance protection is no longer the principal consideration in determining the economic positions of the spouses on marriage breakdown, the Commission is of the view that it would be anomalous and conceptually difficult to retain it even as a partial objective in determining the survivor's share in the deceased spouse's estate. We have concluded that the dissolution of the marital relationship by death should not afford the survivor less than dissolution by marriage breakdown.

(c) Circumventing "The Dower Act"

A fundamental defect in the legislation is the apparent ease with which the applicability of the fixed share may be avoided. Dower, as originally conceived at common law, had been an effective protection against complete disinheritance, inasmuch as it could not be defeated by some inter vivos disposition. Any grantee or devisee of the husband took subject to the widow's dower rights so that she could not lose her interest without her consent.

In contrast to common law dower, the size of the fixed share is determined by the property comprising the net estate at the time of the deceased spouse's death. The property right of a surviving spouse which is protected by the fixed share is only an expectant interest. The vesting of the interest in any part of the deceased spouse's property is contingent upon the property becoming part of the deceased's estate. This contingency is defeated when the predeceasing spouse channels all or a portion of his/her wealth to others by a variety of means such as making outright inter vivos gifts, setting up joint bank accounts, or creating joint tenancies with respect to real property, devising revocable trusts or settling property on trust but retaining a limited power of encroachment, or simply making outright transfers in contemplation of death (donatio mortis causa). Where there are no assets left in the estate, the right to a fixed share of 1/2 of the deceased's net estate consists of a right to take 1/2 of nothing.

On the other hand, the provisions of "The Marital Property Act" do provide a measure of protection to a spouse who seeks an accounting during the spouses' joint lives.[57] It recognizes an "inchoate" right to property which accrues over time due to some species of presumed contribution. To protect this inchoate right, there are certain safeguards afforded a spouse when the other spouse makes an excessive gift, a transfer for inadequate consideration, or of an act jeopardizing the financial security of the household.[58]

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[57] There are controls, in varying forms, as a standard feature in most jurisdictions. See, for example, The Matrimonial Property Act, S.S. 1979, c. M-6.1, s. 28 (1) et seq.; Matrimonial Property Act, R.S.A. 1980, c. M-9, s. 10(1) et seq.; Family Law Reform Act, R.S.O. 1980, c. 152, s. 9.

[58] "The Marital Property Act", C.C.S.M. c. M45, s. 6(7)-6(11).

Broadly stated, the value of the dissipated asset, the excessive gift, and the transfer for inadequate consideration are included in the inventory of the spouse attempting the evasion. In addition, there is a limited form of recovery from the recipient of such benefits.

In the end, a spouse is permitted to defeat a survivor's claim to his or her fixed dower share but not a claim for an accounting of these assets during the spouses' joint lives. The Commission is of the view that the surviving spouse should be ensured at least the same measure of protection and benefits as a spouse is accorded when seeking an allocation of marital property under "The Marital Property Act".

2. Technical deficiencies

Apart from the conceptual deficiencies found in s. 15 of "The Dower Act", the complexity of its drafting and the obscurity of its language have raised a number of unresolved issues which have thrust the law into a state of uncertainty. This uncertainty in the application of the Act will not be set out at length. We simply propose to identify some of the technical flaws briefly as we are of the view that the conceptual deficiencies alone, in light of the principles for sharing under "The Marital Property Act", forcefully establish the case for fundamental reform.[59] Some of the ambiguities respecting the application of the fixed share under "The Dower Act" would include the following:

(a) Whether the provision of property to the value of one-half the deceased's net real and personal property for the survivor's benefit by some means other than through the terms of the deceased's will, precludes the operation of s. 15 of "The Dower Act";[60]

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[59] Under the specific recommendations for reform we highlight further uncertainty in the application of "The Dower Act".

[60] In Re McFayden, [1942] 2 W.W.R. 572 (Man. Surr. Ct.) it was held that insurance proceeds constitute a provision made otherwise than by will and must be added to the share of the estate provided to the survivor by will in order to determine whether or not the survivor has benefitted to the extent of one-third [now one-half] the value of the net real and personal property. But see supra n. 24 at 398 for a different interpretation of the words "or otherwise provided for her".

(b) Whether there is any duty on the surviving spouse to account for insurance policies on the life of the testator maintained solely by the surviving spouse;[61]

(c) Whether a birthday gift, appropriate to the recipient's station in life, such as jewelry or rare art pieces, should be deducted by the surviving spouse; Whether savings from the household accounts used to purchase food and other necessaries should be charged against the fixed share;[62]

(d) Whether the appropriate point in time to value post-nuptial gifts for the purpose of computing the fixed share is the date of receipt or the date of death;

(e) Whether the operation of s. 15 of "The Dower Act" is precluded in the event of a partial intestacy;[63]

(f) Whether the Court must award the applicant spouse at least that which (s)he would have been entitled to under "The Dower Act" when an application is first brought under "The Testators Family Maintenance Act";[64]

(g) Whether property which is acquired by way of survivorship should be set off or accounted for by the surviving spouse to the extent that it may be viewed as a post-nuptial gift;[65]

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[61] The definition of insurance policies in section 2(f) on the life of the testator is drafted so widely that it appears to include policies maintained solely by the survivor.

[62] The dividing line between property acquired in the form of household furnishings and necessities and true gifts may prove to be an elusive distinction to draw.

[63] Both the wording of section 15 together with section 19 appear to restrict the operation of the fixed share to wholly testate situations. But see, supra n. 24 at 403 for the anomalous results which follow when the fixed share is invoked in the event of a partial intestacy.

[64] The pertinent case law is set forth at p. 86.

[65] In Re Bergen's Estate (1982), 24 Man. R. (2d) 249 (Surr. Ct.), it was held that the principal residence transmitted to the widow by virtue of her right of survivorship did not have to be deducted from her share of the estate under "The Dower Act" because it was not property "conveyed to her or her benefit as a gift or by way of advancement". The right accruing by virtue of survivorship was found to crystallize only at death so that chronologically speaking death preceded the transmission of ownership. But see Re Lawther, supra n. 43 at 594 where the court did account for property acquired by way of survivorship.

(h) Whether real and personal property situate outside Manitoba is to be included in determining the fixed share under s. 15 of the Act;[66]

(i) Whether the operation of the present Act is restricted to spouses who reside or have resided in the Province of Manitoba.

C. The Need for Reform

To recapitulate, under the present Manitoba regime there is a lack of symmetry between the principles governing a pre-death distribution of property and those governing a post-death distribution of property. Lack of a uniform policy or approach is not in and of itself inherently wrong or undesirable, but more importantly, the results that flow from the operation of two separate systems of property distribution determine the merit of such a regime. Quite simply stated, there is now disparity in the statutory treatment of property rights when a marriage is terminated during the spouses' joint lives and when it is terminated by death. Many of the conceptual deficiencies and limitations of the fixed share under "The Dower Act" are attributable to the novel approach taken by "The Marital Property Act" with respect to an entitlement to an equal sharing. As we observed earlier, the conceptual deficiencies alone forcefully establish the case for fundamental reform.

The Commission has concluded that some mechanism for sharing in the deceased spouse's estate on death is undoubtedly of positive value. A statutory right to share at death in the property accumulated during the marriage is rooted in the view of marriage as a partnership, and derives from the presumption that each of the partners contributed equally and independently to the acquisition of property. This right is not to be confused with a right of maintenance. In our estimation, the two differ fundamentally.

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[66] Where a testator lived in British Columbia with real and personal property in Manitoba, it was held that the surviving spouse who was a resident of British Columbia could elect her fixed share but her rights under "The Dower Act" were restricted to the husband's real property in Manitoba. See *In Re Elder Estate*, [1936] 2 W.W.R. 70 (Man. K.B.). On the other hand, in *Morgan* v. *Altman* (1961), 34 W.W.R. 452 (Man. Q.B.) where the testatrix lived in Manitoba with real and personal property both in Manitoba and Saskatchewan, it was held that the then one-third share which the husband claimed under "The Dower Act" must be based on all assets wherever situate. *And see* *Re Williams Estate* (1983), 21 Man. R. (2d) 157 (Surr. Ct.).

We do recognize that dissolution of the marriage by death cannot in all respects be equated to marriage breakdown during the joint lives of the spouses. Both events terminate the marriage but their factual context is different. For example, the deceased spouse has no future income, earning capacity or financial needs and often too the age of the parties to a marriage at the death of one of them is likely to be greater than the age at divorce or separation. Yet testamentary freedom and a strong tradition of respect for the intent of a testator/trix result in at least as much concern for and protection of the predeceasing spouse as for the living spouse. It is our view that the termination of marriage by death should not produce markedly different results from those when the marriage has broken down during the spouses' joint lives. To the extent that there are differences, they must have a rational foundation.

Distinct problems will undoubtedly arise in view of the interaction between succession law and an allocation of property on death. Apart from the entitlement of the surviving spouse to a fair share in the marital property accumulations, we have identified two other important interests in the law of succession, namely, that of testamentary freedom and that of proper maintenance for specified dependants of the deceased under "The Testators Family Maintenance Act". Simply put, freedom of testation is the right of the owner of property to dispose it by will as (s)he sees fit. Proper maintenance for dependants embodies two components. One recognizes the responsibility of the deceased to his/her dependants which is of an individual nature. The other is the social responsibility of the deceased to the state. The deceased should provide proper maintenance to his/her dependants in order that they will not become a charge on the public purse.

We recognize that these interests are not compatible. We will attempt to consider and to weigh each of these three competing interests in our aim to achieve an appropriate balance among them. The Commission acknowledges that no scheme for the sharing of property on death can possibly provide perfect justice for the variety of economic circumstances, life styles and preferences found in society today. We hope to propose a scheme which will effect a fairer and more equitable distribution of property at death and one which will be as simple as possible while providing a practical solution to the problems identified.

D. The Field of Choice

The Commission assessed the suitability of three possible approaches or options by which a more equitable sharing of the deceased's estate might be accomplished, namely:

(a) The continuation of the fixed share with appropriate amendments to remedy the deficiencies;
(b) A system of judicial discretion;
(c) A deferred sharing regime operative on death.

There are, of course, many variants which could be devised to these three basic approaches. However, we have not attempted an exhaustive review by detailing every possible variant of any one system. Rather, we briefly describe the three basic approaches which we have considered as likely to be suitable in Manitoba. In fact, the three possible approaches presented are composites of systems adopted in other jurisdictions. We turn now to examine the strengths and weaknesses of each option itself and in relation to each other.

1. Continuation of the fixed share with attempted amendment

This first approach would continue the general framework or basic structure of the fixed share. That is, on the dissolution of a marriage by death, the surviving spouse would have a right to a fixed share of the deceased's estate. An attempt would be made, however, to remedy some of the shortcomings and deficiencies which time has brought to light and to clarify ambiguities, some of which we referred to earlier.

(a) A possible model; the Uniform Probate Code

In considering this first approach, one of the models that the Commission examined was the American Uniform Probate Code.[67] The augmented estate is the central concept of the Code's elective share and it is comprised of three distinct segments. The first segment includes the deceased's gross estate less enforceable claims, certain exemptions, funeral expenses and administration expenses. The second segment is comprised of specific types of gratuitous transfers of property by the spouse during marriage to persons other than the surviving spouse. The inclusion of property in the second segment is to prevent the spouse who owns the wealth from transferring his/her property by non-probate devices to third parties in order to defeat the rights of the surviving spouse. A transfer is only included to the extent that the deceased did not receive adequate consideration in money or money's worth.

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[67] Uniform Probate Code section 2-201, (1969). This Code was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association. The common law states which have substantially adopted the augmented estate approach under the Uniform Probate Code are as follows: Colorado, Nebraska, Alaska, Maine, North Dakota and Montana, and it is under consideration or study in several additional jurisdictions. In total, approximately 40 American States have some form of statutory share or elective share, which provisions vary widely among the States with respect to the interest a spouse may elect to take, the property to which the election applies, the form of the election and the effect on other benefits available to a spouse.

The third segment includes property gratuitously derived by the electing spouse from the deceased that is either owned by the spouse at the deceased's death, or has been given away by the spouse in a will-like transaction.[68] The stated purpose of including property comprised in segment three is to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the predeceasing spouse either during the lifetime of the spouse or at death by way of non-probate arrangements.

The sum of the value of these three segments equals the augmented estate and the survivor's elective share equals one-third of the augmented estate. The survivor must then credit or set-off against the elective share all values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the survivor but were renounced.[69] The balance of the elective share is payable out of the remaining property of the augmented estate without distinction between probate and non-probate property.[70]

The fixed share approach under the Uniform Probate Code would afford some measure of certainty and security for the surviving spouse. This is particularly so since the survivor's share would be absolute and would not be subject to alteration by application of judicial discretion. As well, the augmented estate concept under the Uniform Probate Code directs its attention to correcting the deficiency where a spouse channels all of his/her estate to others such that the probate estate contains little or no assets.

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[68] The Code puts the burden on the surviving spouse to prove that property owned by the surviving spouse is derived from a source other than the deceased spouse; otherwise, the property is presumed to have been derived from the deceased.

[69] Uniform Probate Code, section 2-207.

[70] The liability for the balance of the elective share is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

The Commission's primary concern with respect to the continuation of the fixed share is that any attempted amendment which still retains the basic structure of the fixed share under "The Dower Act" would simply result in the removal of the technical defects in the present law; many of the conceptual deficiencies would remain. For example, while the Uniform Probate Code gives additional scope and flexibility to the inquiry into each spouse's financial position, it fails to account for wealth owned by the surviving spouse but derived from sources other than the predeceasing spouse and it fails to recognize how or when the predeceasing spouse's property was acquired. Simply put, the survivor may be entitled to take more than his/her fair share of the deceased spouse's estate in the face of his/her own personal accumulations. In addition, we fear that any attempt at piecemeal amendment might, of necessity, result in a fairly complex statutory provision.

If the fixed share is to be continued it should be on the basis that, with amendment, it will effect an equitable distribution of property on death. In our view, the fixed share does not go far enough in accomplishing this aim and we do not favour its continuation.

2. Discretionary system

The second option for reform is a system of judicial discretion under which the Court would exercise broad powers to determine the surviving spouse's entitlement, if any, to the deceased spouse's estate on dissolution of the marriage by death. Such an approach could also set out either detailed factors or, alternatively, very general guidelines which the court might consider in each case.

The discretionary system which we considered would be distinct from the present right to apply under the various dependant relief Acts in force across Canada. These Acts employ a discretionary power in an attempt to provide a measure of proper support to the surviving spouse and children of a deceased person who have not been adequately provided for on death. Although the Acts of the various provinces differ in many respects, they do have this much in common: they are generally to be regarded as limitations on the testator's testamentary freedom in order to ensure support obligations, not as creating property rights arising from the marriage.[71] The discretionary approach which we have studied would, however, contemplate a right to apply for a fair share of the property of the deceased's estate.

(a) The English system

The English Law Commission recommended a discretionary system when it determined that the role of family provision law (similar to our "Testators Family Maintenance Act") should be extended beyond the sphere of maintenance so that it could be used to secure for the surviving spouse ownership of a fair share of the family property. Recognizing the anomaly that English law then accorded greater rights to a divorced spouse than to a surviving spouse, the English Law Commission proposed in 1974 that a court's power to award family provision for the surviving spouse on death (but not for a former or separated spouse) should be as wide as its power to award provision upon divorce.[72]

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[71] See, for example, Richards v. Person (1983), 146 D.L.R. (3d) 565 (B.C.C.A.) where it has recently been confirmed that the considerations and equitable forces operating on a division of assets on marriage breakdown are vastly different from and irrelevant to those which came into play upon the death of a spouse, and are improper considerations under the Wills Variation Act (pertinent dependants' relief Act).

[72] The Law Commission, Second Report on Family Property: Family Provision on Death (No. 61) London, (1974) at 5.

This same general approach was recently recommended by Arthur L. Close in his dissent in the Law Reform Commission of British Columbia's report on Statutory Succession Rights. See Law Reform Commission of British Columbia, Report on Statutory Succession Rights (No. 70). Vancouver, (1983) at 138.

And see A. Bissett-Johnson and W.H. Holland (eds), Matrimonial Property Law in Canada (1980) at NS-47 where it is suggested that adequate provision for a surviving spouse under a dependants' relief Act should be no less than that sum which the applicant would have received had (s)he instituted proceedings for an equal sharing of matrimonial assets under "The Matrimonial Property Act" immediately preceding the death of the testator.

The following year, the Inheritance (Provision for Family and Dependants) Act 1975[73] was enacted. The English Act neither specifies what the provision ought to be, nor does it give a right to any minimum provision at all; both the right and the quantum alike are matters of judicial discretion. Subsection 3(2) of the Act provides that, where an application is made by a surviving spouse, the court shall have particular regard to: (a) the age of the applicant and the duration of the marriage; (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family. The subsection also directs the court to have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

(b) Ontario's approach

We have observed that major reforms in the law of succession have recently been effected in Ontario through the Succession Law Reform Act.[74]

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[73] Inheritance (Provision for Family and Dependants) Act 1975, c. 63. Some writers have questioned, however, whether this Act does in fact fully achieve the English Law Commission's aim. See, for example, J.G.R. Martyn, The Modern Law of Family Provision (1978) at 20, 22; Williams, Mortimer and Sunnucks, Executors, Administrators and Probate (1982) at 627 et seq.

[74] Succession Law Reform Act, R.S.O. 1980, c. 488. While the Ontario Act does not incorporate a minimum level of sharing, section 62 sets forth some factors to assist the court in determining whether the deceased has made adequate provision for the applicant's proper support. Three which may be of particular import to the surviving spouse are as follows:

- (a) the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions;
- (b) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property, business or occupation;
- (c) where the dependant is the spouse of the deceased, a course of conduct by the spouse during the lifetime of the deceased that is an obvious and gross repudiation of the relationship.

It would appear, however, that Ontario's reforms do not ensure the aim of effecting a fair distribution of marital property on death for the surviving spouse. In determining whether proper provision has been made for a surviving spouse and in determining the quantum of the award, it would seem that courts have not generally accepted the principle that regard should be had to what that spouse might have received in an application under the applicable marital property Act.[75] This has prompted the criticism that in Ontario a divorced or separated spouse may have greater property rights than a person who continues to live with his/her spouse until death.[76] This criticism is exacerbated by the fact that the surviving spouse in Ontario is merely one of an expanded range of dependants entitled to bring an application for support and, consequently, may be required to compete with other claimants.[77] This concern that the surviving spouse may not receive as large a share of the property as a divorced or separated spouse has also been echoed in other provincial jurisdictions.[78]

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[75] *See* for example, *Re Mannion* (1981), 127 D.L.R. (3d) 626 (Ont. Surr.Ct.); aff'd 140 D.L.R. (3d) 189 (Div. Ct.); aff'd 6 D.L.R. (4th) 758 (Ont. C.A.) wherein it was submitted that once it has been shown that a testator has not made adequate provision for the proper support of a dependant, resort must be had not only to the provisions of the *Succession Law Reform Act* but also to the *Family Law Reform Act*, in determining what provision should be made to provide such proper support. The Court of Appeal stated that while the provisions of the *Family Law Reform Act* and Part V of the *Succession Law Reform Act* are parallel in many respects, they are not identical. Each was said to form its own code and to be directed towards a different end.

See also A.H. Oosterhoff, "Dependants' Support - New Principles under the Succession Law Reform Act" (1982), 6 E. & T. Q. 1 at 7.

[76] *See* for example, A.H. Oosterhoff, "Some Aspects of Support of Dependants" (1982), 12 E.T.R. 197 at 203; G. Bale, "Dependants' Relief Legislation and the Changed Emphasis Effected by Part V of the Succession Law Reform Act (Ontario)" (1982), 10 E.T.R. 6 at 10 where he is commenting on the case of *Re Dentinger* (1981) 10 E.T.R. 6 (Ont. Surr. Ct.) and [illegible]

> The result is that divorced or separated spouses have greater property rights than a spouse who continues to live with his or her spouse until death - a peculiar negative award for faithfulness.

And see Ontario Status of Women Council, "Brief to the Government of Ontario Respecting Widow's Rights to Family Property" (1980).

(c) Assessment of discretionary system

What makes a discretionary approach attractive is that it permits the court to make a decision based upon the individual merits of a particular case. There is great flexibility to meet the circumstances of the individual case. In addition, such a system would in some respects probably be the easiest approach to adopt and implement.

These advantages, however, would appear to be overshadowed by a number of disadvantages. We do not favour a complete system of judicial discretion because we think that it raises difficulties of some magnitude, both in terms of general policy and concrete application in particular cases.

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[77] A. Bisssett-Johnson and W.H. Holland (eds.), Matrimonial Property Law in Canada (1980) at 0-92.

[78] We have observed that the Law Reform Commission of British Columbia has recently issued a Report on Statutory Succession Rights (No. 70), Vancouver, (1983). While that Commission concludes that the surviving spouse should be entitled to a generous share of the deceased's estate, the only recourse for a disinherited spouse, whose marriage is dissolved by death and where there has been no "triggering event" prior to death, is to make an application under the pertinent dependants' relief Act, namely, The Wills Variation Act. We agree with the reservation by Arthur L. Close wherein he states, at page 158, that this situation is capable of yielding anomalous results. He points out "that the faithful spouse who remains with the testator until his or her death may be placed in a worse financial position than the spouse whose conduct leads to a "triggering event" on the eve of the testator's death". And see Institute of Law Research and Reform, Family Relief, Report No. 29, Edmonton (1978) at 10.

A fundamental objection would lie in its lack of certainty or predictability. This uncertainty arises from the differing circumstances of each case and the divergent opinions of individual judges. A further argument for rejecting the discretionary approach would be that it does not give significant recognition to the right of a spouse to a fair share in the couple's economic gain as differentiated from a mere opportunity to ask for a share under a discretionary scheme. A surviving spouse would not have a right to an equal share, but only a hope to obtain it. In our opinion, the history of the fixed share is too deeply ingrained in Manitoba's legal tradition to give way at this time to a completely discretionary system.

Another unsatisfactory feature of a discretionary system would be that the survivor's rights would have to be determined in the courts, in the absence of consent from each of the beneficiaries to the proposed division of the deceased's property. A court application can be an expensive procedure and, depending upon how the discretionary power is exercised, may well bring little in return. In our view, this would effect an undesirable change to the present law as the surviving spouse may now seek a fixed share without resort to the court by way of settlement with the personal representative of the deceased's estate. The Commission is also concerned that a discretionary system might encourage litigation because, with no minimum share enshrined in a statute, a surviving spouse may be prompted to make an application with the hope of persuading the court to make a more favourable disposition.

Finally, it is our view that "The Testators Family Maintenance Act" should be confined to a support statute. If there is to be an equitable allocation of property at death, we believe that it should be achieved through a marital property statute and not in the legislative context of "The Testators Family Maintenance Act".

3. Deferred sharing regime operative on death

The third approach is a deferred sharing regime operative on death which would generally be based upon the principles under "The Marital Property Act". Separation of property would be retained as the basic regime during the life of the marriage but on the dissolution of the marriage by the death of a spouse, the surviving spouse would be entitled to one-half of the economic gains made by both during the marriage.[79] The regime would not effect a vesting of property in the surviving spouse. Rather, it would provide the surviving spouse with a means of seeking an allocation of property on death if (s)he so desires.

The basis of the deferred sharing regime lies in the requirement that generally the spouse with the greater estate must make a payment to the spouse with the lesser estate, in order to balance their respective economic positions. Depending upon the property accumulations of each spouse, a balancing claim may or may not be payable to the surviving spouse. The allocation of property would not be in kind but rather would be effected by way of a money payment.

Four provinces, namely, Saskatchewan, Nova Scotia, New Brunswick, and Newfoundland, apply a deferred sharing regime to divisions on death. This was achieved in each province by incorporating death as a triggering event in their marital property legislation, thereby entitling the surviving spouse to seek a division of marital property on the death of a spouse.[80] Both the

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[79] It is not contemplated that a divorced or former spouse would be entitled to seek an allocation of property under the deferred sharing regime on death.

[80] The Matrimonial Property Act, S.S. 1979, c. M-6.1, s. 30(1); Matrimonial Property Act, S.N.S. 1980, c. 9, s. 12(1)(d); Marital Property Act, S.N.B. 1980, c. M-1.1, s. 4(1); The Matrimonial Property Act, S.N. 1979, c. 32, s. 19(1)(d).

Alberta Institute of Law Research and Reform[81] and the Ontario Law Reform Commission[82] recommended that a deferred sharing regime be operative not only on marriage breakdown but also when the marriage is dissolved by death.[83]

E. Conclusion

In general, we believe that the adoption of the deferred sharing regime on death will provide the most satisfactory legal framework for determining the surviving spouse's share, if any, of the deceased's estate. We favour this approach as the most appropriate option for reform and we set out the details for an accounting on death under our specific recommendations for reform in Chapter 3. The considerations which have led us to favour a deferred sharing regime are as follows.

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[81] Institute of Law Research and Reform, Matrimonial Property, Report No. 18, Edmonton (1975) at 91 et seq.

[82] Ontario Law Reform Commission, Report on Family Law, Part IV, Family Property Law, Toronto, (1974) at 55.

[83] Neither of these schemes were embodied in legislation. In Ontario, the legislative decision to exclude applications for a division of family assets after the death of one of the spouses was predicated on the apparent belief that the provisions of the Succession Law Reform Act provided satisfactory protection for the interests of surviving spouses. It has recently been confirmed that if one spouse dies, it is not possible to bring an application under Part 1 of the Ontario Family Law Reform Act. See Kiss v. Palachik (1981), 34 O.R. (2d) 484 (C.A.), affirmed (1983), 47 N.R. 148 (S.C.C.). If, however, an application had been commenced prior to death, then it may be continued.

In Alberta, an action may be commenced if the surviving spouse could have commenced the action immediately before death. The Matrimonial Property Act, R.S.A. 1980, c. M-9, s. 11(1) and (2). The triggering events are set forth in subsection 5(1) of the Act.

First, the Commission has concluded that a deferred sharing regime applicable on death would achieve a fairer and far more equitable division of property than the fixed share. By taking into account the length of the marriage, the separate property accumulations of the survivor and the source of the property of each of the spouses, it would lead to a greater measure of justice to the spouses. We think that deferred sharing reflects the contribution of both spouses more exactly by considering the interests of not only the survivor but also the predeceasing spouse. For example, by causing the surviving spouse to include separate property accumulations, the deferred sharing on death grants the predeceasing spouse a wider power of testamentary freedom than the fixed share.

Second, the Commission believes that the principles for sharing under "The Marital Property Act" are equally forceful on death.[84] Why then, it may be asked, should the legislative policy be to create distinct rules for sharing in the spouse's property simply because one of the spouses has died? Given that the sharing of marital property under "The Marital Property Act" is premised upon the joint contribution of both spouses to the marriage, there is no reason for entitlement to vanish on death. These principles set forth in "The Marital Property Act", in our view, should govern an allocation of property on death; we can see no functional reason for continuing the two distinct property distribution schemes.

A deferred sharing regime operative on death would lead to a more uniform policy with respect to pre- and post-death distribution of property which would help to achieve simplification and consolidation of matrimonial property law with succession legislation. This would serve to ensure that rights of succession are in greater harmony with the principles of "The Marital Property Act".

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[84] We are fortified in this conclusion given that dower rights, in practice, operate only where the deceased has disinherited or made very little provision for the survivor. While we recognize that this is not always the case, this will often occur where there has been a breakdown of marriage or at least disharmony and the very essence of the deferred sharing regime under "The Marital Property Act" is to provide for an equitable sharing in this instance.

Third, a distribution of property would likely be easier to effect under a deferred sharing regime than under a complete system of judicial discretion where there would be a number of factors to be considered and there would be difficulty in forecasting how a particular discretion will be exercised. In order to achieve fairness under a discretionary system, the court, in exercising its power, would have to determine the property to be shared, its proper valuation and what the respective rights of the spouses should be. Hence, the process would involve many of the same considerations and complications as the determination of a balancing payment entails under a deferred sharing regime but there would be no statutory rules to provide guidance to the court in exercising its discretionary power.[85]

Finally, a deferred sharing regime operative on death, by conferring specific rights, would provide the spouse who had few or no assets with a much larger measure of security and certainty than a completely discretionary system.

It can safely be stated that most spouses leave their entire estate to their surviving spouse, irrespective of the number of their children provided all of the children are also issue of the surviving spouse.[86] Even where the surviving spouse is entitled to a balancing claim, there may well be instances where the surviving spouse will not wish to seek an accounting on death.[87] There are usually harmonious relationships between the widow(er) and other beneficiaries, and the demand by a widow(er) for a larger share would only take money from other beneficiaries who may often be the survivor's own children.

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[85] Supra n. 81 at 26 et seq.

The fact that most spouses do provide amply for their survivor is not, in our view, reason enough for removing all statutory entitlement.[88]

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[86] There would appear to be a number of sound reasons to support this testamentary pattern. First, where any of the surviving issue are minors, the predeceasing spouse would likely want to ensure that ample funds were available to the spouse in order that (s)he would continue the sole responsibility of supporting and educating the surviving minor children. Second, even where the surviving issue are adults, usually the bulk of the deceased's capital will be left to the surviving spouse, for the children will likely be self-supporting and the surviving spouse will be reaching an age where self-support is increasingly more onerous. More importantly, where all of the issue are also issue of the surviving spouse, it is the usual course that any remaining estate of the predeceasing spouse will ultimately reach his/her issue through succession as at the death of the surviving spouse. See Report on the Uniform Intestate Act, supra n. 54 at 219 et seq.

See also Browder, "Recent Patterns of Testate Succession in the United States and England", (1969), 67 Mich. L. Rev. 1303; Dunham, "The Method, Process, and Frequency of Wealth Transmission at Death", (1963) 30 U. Chi. L. Rev. 241; Plager, "The Spouse's Nonbarrable Share: A Solution in Search of a Problem", (1966) U. Chi. L. Rev. 681.

[87] It should be borne in mind throughout that an allocation of property on death under a deferred sharing regime would still be a matter of election on the part of the surviving spouse.

[88] This is particularly so given the fact that many spouses who prepare wills usually do so with legal advice. Therefore, it may be presumed that most of them have been told of the provisions of "The Dower Act" and other statutes and reluctantly or otherwise have agreed to wills which are immune from partial invalidation by the exercise of the fixed share.

Survivors should not be left to depend upon the good will of the predeceasing spouse. A surviving spouse who has persisted happily or unhappily in a marriage only to be disinherited, should be entitled to seek an allocation of property on death in order that his/her efforts and contributions to the marriage will be recognized. Accordingly, we recommend:

RECOMMENDATION 1

That the fixed share set forth in section 15 of "The Dower Act" be repealed.

RECOMMENDATION 2

That there be enacted in Manitoba a deferred sharing regime operative on death.

CHAPTER 3

SPECIFIC RECOMMENDATIONS FOR REFORM: THE OPERATION OF A DEFERRED SHARING REGIME ON DEATH

There is a similarity between the regime we propose and those systems now operating in the four Canadian provinces of Saskatchewan, New Brunswick, Newfoundland and Nova Scotia. While our deliberations were most certainly assisted by these statutory enactments, our recommendations do differ in detail from all of them. Our observation and examination of the legislation in the other provinces has indicated that there is much diversity in the schemes and that no one solution for all of the varying issues confronted has been universally accepted.

As we mentioned earlier, the termination of the matrimonial regime by death will require special examination of the interaction between succession law and an allocation of property on death. It is imperative, in our view, to set forth how the principles of a deferred sharing regime should interact with succession law. In Chapter 6, the mechanics for reform are considered in much greater detail. For purposes of the present discussion, however, it is helpful to bear in mind that we later recommend that the proposed regime be incorporated as a separate part of the present "Marital Property Act". Accordingly, some of the recommendations for reform which follow may embody consequential amendments to "The Marital Property Act" in light of our aim of integrating the two pre- and post-death property distribution systems into a more uniform and workable scheme.

We now turn to an examination of the details respecting the adoption of a deferred sharing regime on death, under each of the following headings. Some of the issues first addressed by the Saskatchewan, Ontario and Alberta law reform agencies, to whom we are indebted, are to be found in the following discussion. In particular, we wish to acknowledge our indebtedness to the Law Reform Commission of Saskatchewan as we have benefitted much from the unpublished research papers that it has prepared in conjunction with its Family Law project.

A. Property Subject to Sharing

A principal issue arises with respect to the determination of the appropriate property acquisitions which should be subject to sharing between spouses upon death. In particular, we have considered whether the same property acquisitions which are shareable in an accounting during the spouses' joint lives under "The Marital Property Act" should also be shareable on death.[89]

The scheme under "The Marital Property Act" is to exclude certain categories of property from sharing, such as the value of all pre-marital acquisitions, gifts, trust benefits, or inheritances from third parties unless these were conferred with the intention of benefitting both spouses.[90] The great virtue of this concept of sharing only marital property acquisitions is that it reflects the realities of the economic partnership which is one component of the functioning marriage. The acquisition of property during the marriage through the effort and contribution of both spouses and the income from such property is bonded to the marriage; other property is not.

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[89] It should be noted that the property subject to the prima facie right to an equal sharing varies from province to province.

[90] "The Marital Property Act", C.C.S.M. c. M45, s. 4(1)(c), s. 7(1)-(5) and s. 8(1). The Act, however, also sets forth some rules which, in certain circumstances, will cause these property acquisitions to be subject to an accounting. For example, subsections 7(4) and 7(5) provide that any income or appreciation in the value of a gift, inheritance or gift of insurance premiums would be shareable where it could be shown that this was the intention of the donor. Similarly, where the income or appreciation from such an asset is used for the purchase of a family asset, it is to be accounted for.

Broadly speaking, none of the four Canadian provinces which have adopted a deferred sharing regime on death have devised rules for the sharing of property on death which are distinct from those which are applicable in an accounting during the spouses' joint lives.[91] The Ontario Law Reform Commission, however, had suggested that different rules should govern the distribution of property on death. Its proposal contemplated that the value of all of the property owned by each of the spouses, no matter when or how acquired, should be shareable.[92] It reached this conclusion for principally four reasons:

1. That as one spouse is dead, a primary source of information about deductible values of ante-nuptial and gift property is lost.
2. That the deceased's legal representative does not have the same freedom as a spouse when alive to make agreements or compromises.
3. That marriages terminated by death, taken as a group, will be the longest marriages and this longer time-span will add to the difficulties inherent in the task of identifying and evaluating property owned by the deceased spouse at the date of the marriage.

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[91] The only exception would appear to be in New Brunswick where special rules apply respecting the vesting of the marital home on death. There is a presumption in favour of the rights of the surviving spouse to the marital home. See Marital Property Act, S.N.B. 1980, c. M-1.1, s. 4(1).

[92] Whereas it recommended that in an allocation of property during the spouses' joint lives, the value of property owned by either party prior to the date of the marriage should be excluded. As well, it contemplated that other types of property acquisitions would be excluded from an accounting.

4. That such deductions are fixed values and due to the presence of inflation and the loss of purchasing power of money, they will become, on the whole, of less significance in cases where a marriage is dissolved by death than by marital breakdown.[93]

The Commission has carefully examined these arguments. We have concluded that it is better to adhere to the original principle of sharing only those accumulations which are amassed by both spouses during marriage.[94] In substance, the sharing of all property forming part of the deceased's estate is very similar to the current provision found in s. 15 of "The Dower Act", which in our earlier deliberations we determined may lead to an unfair distribution of property.

The concept of sharing only marital property is a functional one as it approximates fairness and accords appropriate treatment to both the survivor and the pre-deceasing spouse. No system can do more than this. This approach would cause the survivor to account for all of his/her shareable gains, not simply those that were derived from the deceased. It would permit a wider power of testamentary freedom for the deceased spouse. For example, in the event of a second marriage, the deceased spouse could devise property acquired prior to the second marriage by way of will to children of an earlier marriage. As well, it would impliedly recognize the length of the spouses' marriage, for if the marriage endured for many years, the usually stronger equitable claim of the surviving spouse would be matched by the likelihood that greater amounts of marital property have been acquired. It is as to half of such property that the surviving spouse has an overwhelmingly strong claim.

Bearing in mind the varying interests to be weighed, it is to be emphasized that the problem of the distribution of property on death is itself extremely complex. It is not to be expected that a simple solution should emerge. While we recognize the force of the Ontario Law Reform Commission's reasons, we do not think that its approach would effect a just or fair allocation of property on death.

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[93] _Supra_ n. 82 at 88.

[94] This same approach was recommended by the Alberta Institute of Law Research and Reform, _supra_ n. 81 at 95.

The Commission is mindful that relatively few cases have arisen in the short time since the enactment of the four deferred sharing schemes on death. However, our review of the reported case law to date does not indicate that the Ontario concerns earlier listed have been borne out. Accordingly, we recommend:

> *RECOMMENDATION 3*
>
> *That the rules set forth in "The Marital Property Act" which determine whether a particular asset is shareable in an accounting during the spouses' joint lives apply mutatis mutandis with respect to an accounting of property on death.*

In Appendix B, we have identified and set forth the particular sections of "The Marital Property Act" which govern the determination of whether or not a particular asset is shareable.

1. Ascertainment of Property on Death

As a consequence of the death of a spouse there are various amounts which may become payable either to the deceased spouse's estate or for the benefit of the survivor. For example, there may be proceeds payable under a policy of life insurance, pension benefits or a right of survivorship in real or personal property. From the standpoint of the surviving spouse, these would be benefits which pass to him/her "outside the will". The Commission has considered the question as to whether such benefits should ordinarily be accounted for in an allocation on death.

We have observed that "The Marital Property Act" provides that rights under a life insurance policy, or under an accident and sickness insurance policy, or under under a life or fixed term annuity policy, or under a pension scheme are family assets and that same are shareable in an accounting during the spouses' joint lives, notwithstanding that they have not been realized as at the closing date of an accounting.[95] With respect to real property held as a joint tenancy between the spouses, "The Marital Property Act" does not apply as the "asset has already been shared equally between the spouses".[96]

On principle, it appears to us that benefits arising as a consequence of the death of a spouse are likely to be considered by the spouses as part of the assets which they have accumulated during the marriage. In particular, a substantial portion of many spouses' income may be channelled into a pension scheme such that it is the largest and most important saving for many families. To remove these benefits arising on death from consideration would, in our estimation, undermine the proposed scheme.[97] Accordingly, we recommend that the value of these death benefits should ordinarily be included in the shareable property of the appropriate spouse for purposes of an accounting on death. From the standpoint of the predeceasing spouse, where a portion of these benefits accrued prior to the marriage, it must be determined what portion of the benefit, for example, of the pension was earned during the married life of the spouses.

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[95] "The Marital Property Act", C.C.S.M. c. M45, s. 1(2) ss. 8.1(1).

[96] "The Marital Property Act", C.C.S.M. c. M45, s. 9. And see Isbister v. Isbister (1981), 11 Man. R. (2d) 353 (C.A.).

[97] Alberta also specifically recommended that these benefits arising on death should be included in the appropriate spouse's inventory of property, supra n. 81 at 103.

On the other hand, Ontario recommended that the death benefit payable to a surviving spouse under a policy of life insurance on the deceased's life should be viewed as having been received by the survivor after the termination of the matrimonial property regime and should not be subject to an equalizing claim, supra n. 82 at 95.

While these assets have posed valuation problems of considerable magnitude in an accounting during the spouses' joint lives, on death much of the speculation in valuating will be reduced as one will ordinarily be able to ascertain precisely what benefits are payable and to whom. For example, where a periodic sum is payable to the surviving spouse as a consequence of the death of the predeceasing spouse, it may be valued by determining the lump sum which, if invested as an annuity as at the date of death at current rates of interest, would provide over the lifetime of the survivor, the monthly payments which the plan provides.[98] Finally, with respect to property acquired by the surviving spouse by way of survivorship, the full value of the property should be included in the survivor's inventory as the whole property ordinarily vests in the survivor on the death of the other joint owner. Accordingly, we recommend:

RECOMMENDATION 4

That for purposes of an accounting on death the following property should also be included in the deceased spouse's inventory:

(i) the proceeds of a policy of life insurance on the life of the deceased spouse and owned by either spouse which proceeds are payable to the estate; and

(ii) any other sum of money payable to the estate by reason of the death of the deceased spouse.

RECOMMENDATION 5

That for purposes of an accounting on death, the full value of property acquired by the surviving spouse on the death of the predeceasing spouse by virtue of:

(i) a right of survivorship;

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[98] This same approach appears to have been adopted under section 15(2) of "The Dower Act".

(ii) a pension plan or other lump sum or periodic payment payable to the surviving spouse in his/her capacity as survivor of the deceased spouse; and

(iii) the proceeds of a policy of life insurance on the life of the deceased spouse owned by either spouse which proceeds are payable to the surviving spouse

should also be included in the surviving spouse's inventory.

B. Closing and Valuation Dates

The Commission has determined the date of death of the pre-deceasing spouse to be the general closing date at which to value shareable property. All property both real and personal owned by each of the spouses as of the date of death of the pre-deceasing spouse, if shareable, together with all benefits arising on death, would be included in the appropriate spouse's inventory and valued as at the date of death.

There is, however, one exception which we recommend to the date of death of the pre-deceasing spouse as the general closing date. Where the spouses are living separate and apart as at the date of death and have not yet effected a division of their assets by way of agreement or court order, then the general closing date should be the date the spouses last cohabited with each other.[99] Our intent is to exclude those assets in an accounting on death which were acquired while the spouses lived separate and apart.[100] Accordingly, we recommend:

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[99] We discuss in greater detail at page 89 the circumstances wherein a separated surviving spouse should be entitled to seek a distribution of property on death.

[100] This is also the approach adopted under s. 4(1)(a) of "The Marital Property Act", C.C.S.M. c. M45.

RECOMMENDATION 6

That, subject to the exception set forth in recommendation 7, for purposes of an accounting on death the closing date for the inclusion of assets and liabilities in the accounting, and the valuation date for each asset and liability, should be the date of death of the spouse.

RECOMMENDATION 7

That for purposes of an accounting on death, where spouses are living separate and apart as at the date of death of the predeceasing spouse and have not yet effected a complete property settlement by way of agreement or court order, the closing date for the inclusion of assets and liabilities in the accounting, and the valuation date for each asset and liability, should be the date when the spouses last cohabited with each other.

C. Creditors

The Commission's recommendations with respect to the adoption of the proposed deferred-sharing regime on death, are designed to protect and recognize the contribution of each of the spouses to the marriage and not to prejudice the position of third parties who may transact with them. The rights of creditors should not be altered by an allocation of property on death; only those assets remaining, after all outstanding debts, liabilities, funeral and testamentary expenses have been paid or provided for, should be shareable.[101] Accordingly, we recommend:

RECOMMENDATION 8

That all enforceable claims of third party creditors and all funeral and testamentary expenses have priority over the payment of a balancing claim in an accounting on death.

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[101] Similarly, section 10(1) of "The Marital Property Act", C.C.S.M. c. M45, ensures that the liabilities of a spouse other than those relating to assets that are exempt from the accounting should be deducted from the total inventory of the assets of that spouse.

D. Sample Accounting

Having determined the property acquisitions which are subject to sharing on death, we set forth the following example illustrating, in a general manner, how the balancing payment would be computed. In many respects, the calculation is not dissimilar to those steps that ordinarily attend the calculation of the value of an estate's following death.

STEP 1: What must be done first is the valuation of all property owned by each spouse at the date of death, together with all death benefits payable to the survivor and to the deceased's estate. The deceased spouse's inventory is prepared without considering the provisions of the will, if any, or the result on an intestacy.

STEP 2: Each then deducts allowable debts and liabilities.

STEP 3: Also subtracted are those property acquisitions which are not subject to sharing.

STEP 4: What is left is the net value of the property that each spouse amassed during marriage. The deceased's net gains are added to those of the survivor. In practical terms where the deceased spouse has accumulated a larger net gain during the marriage, the survivor may then call upon the deceased spouse's personal representative to make a balancing payment.

Example

Mr. and Mrs. Jones were married for some 20 years as at the date of death of Mr. Jones on June 1, 1983. They had very little property when they were first married. Mr. Jones had a modest stock portfolio then valued at $1,500 which has since escalated in value to $15,000. Mrs. Jones has recently inherited $10,000 from her father's estate. An insurance policy for $40,000 on Mr. Jones' life is payable to his estate, the premiums of which were paid during their married life together. Clear title to the family home is registered in the name of Mr. Jones and is appraised at $130,000. Mrs. Jones has a bank account with total savings from her salary at $12,000. Prior to his death, the only debt of Mr. Jones is a demand loan with the bank for a total value of $5,000. Funeral and other related testamentary expenses totalled $3,500.

STEP 1: VALUATION

Mr. Jones		Mrs. Jones	
Stock portfolio	$ 15,000	Inherited money	$ 10,000
Insurance proceeds	40,000	Bank account	12,000
Family home	130,000		
	$185,000		$ 22,000

STEP 2: DEDUCT LIABILITIES

$185,000	$ 22,000
- 8,500 (5,000 + 3,500)	- 0
$176,500	$ 22,000

STEP 3: DEDUCTIBLE VALUES

$176,500	$ 22,000
- 1,500 (Ante-nuptial property)	- 10,000 (Inheritance)
$175,000	$ 12,000

STEP 4: BALANCING PAYMENT

Total financial product of the marriage: $175,000 + 12,000 = $187,000

This sum is divided in equal shares: $\frac{187,000}{2}$ = $93,500

Determine the difference between Mrs. Jones' smaller estate and an equal share in the total:

$93,500 - $12,000 = $81,500 = Balancing Payment

Although we do not want to anticipate the points dealt with in later sections of this Report, it may serve to avoid confusion if we refer here to one matter which we shall subsequently address in greater detail. It is later recommended that property acquired by the surviving spouse under the will should be credited against the balancing claim. Therefore, in order to determine whether there is any merit in seeking an accounting on death, the surviving spouse must ascertain whether or not his/her own shareable property acquisitions, together with the benefits, if any, conferred by way of will in his/her favour total one-half of the combined shareable gains, that is, $93,500. If so, it would be pointless to seek an accounting as no balancing claim would be payable in favour of the surviving spouse.

From the standpoint of the deceased's personal representative, there is one convenient method to ascertain whether or not a balancing claim is payable in favour of the survivor. Provided that anti-avoidance devices have not been employed, the personal representative need only review the inventory of property submitted for probate; when the deceased has conferred at least one-half of the estate by way of will to the survivor, no balancing claim would be payable.

E. Court Application Not Required

A fundamental question arises as to whether the rules for sharing on the death of a spouse should be framed so as to allow the balancing payment to be ascertained by the survivor and the personal representative without resort to a court application. We do not think it desirable to increase the number of court applications necessary in order to deal with the affairs of deceased persons, nor to create a system that necessarily imposes extra burdens on the assets of the estate in the form of added legal costs. The Commission is of the view, all other things being equal, that a system which makes applications to court unnecessary is preferable to a system which requires court application in order to seek an accounting on death.

The wording of s. 15 of "The Dower Act" presently contemplates that the surviving spouse may seek the fixed share without resort to the courts, by way of settlement with the personal representative of the deceased spouse's estate.[102] It is only in the event of a dispute arising, or of some doubt respecting such matters as the value of the deceased's net estate or the value of the net real and personal property, or as to a determination of the lands and premises comprising a "homestead", that an application need be made to a judge of the Surrogate Court.[103]

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[102] Section 15 provides that ". . . the widow of every testator . . . is entitled to receive from his executor such share of his net real and personal property . . . " (emphasis added).

In two of the Canadian jurisdictions which have adopted a deferred sharing regime on death, namely Saskatchewan and New Brunswick, it would appear that the court approval respecting any settlement is required.[104] However, in Newfoundland and Nova Scotia the legislation expressly contemplates that the personal representative of a deceased spouse may enter into an agreement with the surviving spouse.[105] For example, subsection 40(1) of the Newfoundland Act provides as follows:

> An executor or administrator of a deceased spouse may enter into an agreement with the surviving spouse as to the ownership or division of property under this Act.

We favour this approach and have concluded that an accounting of property on death under the proposed regime may be determined by the surviving spouse and the deceased's personal representative without resort to a court application. This will provide the survivor with the means of obtaining his/her share, if any, of the deceased spouse's estate without introducing the expense and inevitable delay that a court application would bring.

To permit the survivor and the personal representative to agree as to the equal distribution of property raises a further problem for consideration. We are concerned with the situation where the surviving spouse wishes to seek an accounting of property on death but (s)he is also the named executor/trix or appointed administrator/trix of the deceased spouse's estate.[106] It would appear that in such cases the survivor would be in an obvious position of conflict in that his/her personal interests are likely to conflict with the interests of those whom (s)he is bound to protect.[107]

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[103] "The Dower Act", C.C.S.M. c. D100, s. 28.

[104] The Matrimonial Property Act, S.S. 1979, c. M-6.1, s. 34(3); Marital Property Act, S.N.B. 1980, c. M-1.1, s. 4(1).

[105] Matrimonial Property Act. S.N.S. 1980, c. 9, s. 27(1); The Matrimonial Property Act, S. N. 1979, c. 32, s. 40(1).

In light of this concern, the Newfoundland Act expressly provides that the Registrar of the Supreme Court may act in the place of the executor where the executor of the deceased spouse is the surviving spouse.[108] The Nova Scotia Act contemplates that the court may appoint a person to act in the place of the executor in such a case.[109]

We foresee no great danger where the surviving spouse, as personal representative of the deceased's estate, and all the named beneficiaries, all of whom are sui juris, consent to the proposed division of property. However, where the surviving spouse is the personal representative of the deceased spouse's estate and (s)he has been unable to obtain the written consent of each of the named beneficiaries to the proposed distribution, we think that an allocation of marital property on death should require court approval. In such a case, the surviving spouse should not be at liberty to decide unilaterally marital property issues. In addition, should any one of the named beneficiaries be a minor, we think that prior court approval respecting the proposed distribution of property on death is required in order to safeguard the minor's interests. The task of the court would simply be to review the proposed distribution in favour of the surviving spouse to ensure that it was determined in accordance with the rules governing an accounting on death.

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[106] However, we do not think that this scenario will occur often as the deceased spouse will likely have named a person other than the surviving spouse to be the executor/trix when the will confers substantial benefits to persons other than the surviving spouse.

Subsections 17(1)(b) and (4) of "The Dower Act" impliedly contemplate that the surviving spouse as the named executor/trix may elect a fixed share. "The Dower Act" does not preclude this occurrence nor does it set out any special rules respecting same.

[107] It is a general rule that an executor or trustee, having duties of a fiduciary nature towards the beneficiaries, is not allowed to enter into any engagement or agreement in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

[108] The Matrimonial Property Act, S.N. 1979 c. 32, s. 40(2). As of January 1983, the Registrar in Newfoundland advised that he had not yet had occasion to exercise this power.

[109] Matrimonial Property Act, S.N.S. 1980 c. 9, s. 27(2).

If through the course of negotiation there is a question or dispute arising as to the proper allocation of property on death, the Commission has determined that either the surviving spouse or the deceased's personal representative, or any possible beneficiary, may apply to the Family Division of the Court of Queen's Bench for resolution of the matter. For example, the personal representative and the survivor may be unable to agree as to the valuation of a particular asset or the propriety of an alleged deduction, or a named beneficiary under the will may object to the inclusion of certain property in the deceased spouse's estate (e.g., as it is an inheritance). The nature of the proceedings would be the same as set out in the rules respecting an accounting during the spouses' joint lives.[110] Accordingly, we recommend:

> ***RECOMMENDATION 9***
>
> *That, subject to the exceptions in recommendation 10, the personal representative of the deceased spouse's estate may agree with the surviving spouse as to the equal distribution of property on death without resort to a court application.*

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[110] See Queen's Bench Rules 796(1) et seq. Where there are no facts in dispute an application for an accounting during the spouses' joint lives may be commenced by way of originating notice, otherwise by way of statement of claim.

RECOMMENDATION 10

That where the surviving spouse is the personal representative of the deceased spouse's estate and where:

(i) *one or more of the named beneficiaries of the estate is a minor; or*

(ii) *there is the absence of written consent from one or more of the named beneficiaries of the deceased's estate as to the proposed distribution of property in favour of the surviving spouse;*

no settlement or agreement respecting the allocation of property on death in favour of the surviving spouse should be valid unless it is approved by a judge of the Family Division of the Court of Queen's Bench.

RECOMMENDATION 11

That in the event of any question or dispute arising as to the proper accounting of property on death, the surviving spouse, the deceased spouse's personal representative, or any possible beneficiary may apply to the Family Division of the Court of Queen's Bench for the determination of the matter.

It should be noted that depending on the nature and complexity of the matter in dispute, a further avenue may also be available not only to the personal representative, but also to the surviving spouse and possible beneficiaries, to seek the relief of the court by way of summary application.[111]

F. No Discretionary Power

A difficult issue to determine is whether the proposed regime should incorporate a discretionary power to enable the Court to vary the norm of equal sharing of marital property on death. Broadly stated, in each of the four Canadian jurisdictons which have adopted deferred sharing on death there is a presumption of equal sharing of certain property acquisitions.[112] In addition, they all incorporate a discretionary element by providing the courts with the power to vary that presumption of equal sharing by reference to a number of listed factors.[113]

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[111] See "The Trustee Act", C.C.S.M. c. T160, s. 84(1); Queen's Bench Rules 534(1) et seq. Generally speaking, both of these provisions are intended for relatively simple issues as might arise in the course of administration of an estate, and such as do not present any complex issue of fact or law as to which the ordinary statement of claim would apply.

Similarly, under "The Marital Property Act" of Manitoba the characterization of an asset as either a "family" or "commercial" asset determines the extent of the court's discretion to vary the prima facie equal allocation. Subsection 13(1) permits the unequal division of a family asset when, in the opinion of the court, an equal division would be "grossly unfair or unconscionable having regard to any extraordinary financial or other circumstances of the spouses or the extraordinary nature or value of any of their assets". Discretion to vary the equal division of commercial assets may be directed when it would be:

> clearly inequitable having regard to any circumstances the Court deems relevant including
>
> (a) the unreasonable impoverishment by either spouse of the family assets;
>
> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
>
> (c) any spousal agreement between the spouses;
>
> (d) the length of time that the spouses have cohabited with each other during their marriage;

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[112] The Matrimonial Property Act, S. N. 1979 c. 32, s. 17; The Matrimonial Property Act, S.S. 1979 c. M-6.1, s. 20 and s. 21(1); Marital Property Act, S.N.B. 1980 c. M-1.1, s. 4(1); Matrimonial Property Act, S.N.S. 1980 c. 9, s. 12(1).

[113] The Matrimonial Property Act, S. N. 1979 c. 32, s. 20; The Matrimonial Property Act, S.S. 1979 c. M-6.1, s. 21(1); Marital Property Act, S.N.B. 1980 c. M-1.1, s. 7; Matrimonial Property Act, S.N.S. 1980 c. 9, s. 12.

(e) the length of time that the spouses have lived separate and apart from each other during their marriage;

(f) whether either spouse has assets of extraordinary value to which this Act does not apply by reason of their having been acquired by way of gift or inheritance;

(g) the nature of the assets; and

(h) the extent to which the financial means and earning capacity of each spouse has been affected by the responsibilities and other circumstances of the marriage.

The test respecting the division of family assets would appear to be far more stringent than that required to vary the otherwise equal division of commercial assets. The case law has confirmed that the equal division of family assets should be varied only in the most exceptional and unusual of circumstances.[114] We are aware of no Manitoba decision, reported or unreported, where the courts have varied the equal division of family assets. With respect to commercial assets, there have been but a few reported decisions which have varied their equal sharing, most notably the recent decision in *Marks* v. *Marks*.[115] It would seem fair to state that there is a marked reluctance on the part of the court to vary the *prima facie* entitlement to an equal sharing.

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[114] *See* for example, *Brodoway* v. *Brodoway* (1982), 28 R.F.L. (2d) 54 (Man. Q.B.) where Hamilton J. (as he then was) declined to vary the equal sharing on the grounds that there was nothing extraordinary about the existence of savings in the hands of only one spouse and that the scheme of the Act does not permit the court to measure the value of the contribution of each party to the marriage; *Sawchuk* v. *Sawchuk* (1981), 24 R.F.L. (2d) 250 (Man. Co.Ct.); *Downey* v. *Downey* (1983), 24 Man. R. (2d) 269 at 273 (Q.B.); *Burns* v. *Burns*, (1984), 26 Man. R. (2d) 100 (Q.B.).

[115] (1983), 22 Man. R. (2d) 300 (C.A.) where it was found that the wife did not contribute equally to the marriage and accordingly reduced her share to 25%. At issue was the sharing of the appreciation in farm property that the husband had acquired before marriage. At trial, the learned judge distinguished the *Brodoway* case, *ibid.*, as it dealt with the stronger test governing family assets. *See also* *Jones* v. *Jones* (1981), 6 Man. R. (2d), 346 (Q.B.; *Kozak* v. *Kozak*, [1981] 4 W.W.R. 447 (Man. Q.B.); *Schnerch* v. *Schnerch* (1982), 13 Man. R. 277 (Q.B.); *Stewart* v. *Stewart* (1983), 32 R.F.L. (2d) 134 (Man. Q.B.). *But see* *Thibedeau* v. *Thibedeau* (1982), 28 R.F.L. (2d) 14 (Man. Q.B.); and *Rotzetter* v. *Rotzetter* (1984), 27 Man. R. (2d) 277 (Q.B.) where the court expressly refused to vary the equal division of commercial assets.

Bearing this in mind, the absence of a discretionary power on death would not lead to a radical departure from the decided case law to date. The Commission has decided not to import a discretionary power on death. In our opinion, the differing circumstances of death suggest this approach for a number of reasons. We set forth each of these reasons in turn.

While the statutory regimes operative on death are novel and largely untested, our examination of the few cases from the four jurisdictions which incorporate a discretionary power on death would seem to suggest that a discretionary factor is an important power on death and its application has led to differing results. In some instances, it has been employed to deny any interest in assets and to restrict the survivor to simply those benefits conferred under the deceased's will.[116] On the other hand, some courts have employed a discretionary power to award the surviving spouse with what appear to be very generous benefits.[117] In addition, there would seem to be a willingness on the court's part to rewrite the deceased spouse's will by application of a judicial discretion.[118] This has prompted one writer to suggest that excessive sentimentality in the guise of equitable discretion has the effect of defeating the primary thrust of an allocation of property on death.[119]

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[116] *See* for example, *Smith* v. *Smith* [1981], 21 R.F.L. (2d) 429 (Sask. Q.B.); leave to appeal to the Supreme Court of Canada granted (1982), 18 Sask. R. 180.

[117] *See* for example, *Bugoy* v. *Bugoy* (1981), 4 W.W.R. 136 (Sask. Q.B.) leave to appeal to the Supreme Court of Canada granted (1982), 18 Sask. R. 180.The court found that because the wife had altered her will to leave everything to friends and because her death was held to constitute an extraordinary circumstance, the unequal division of matrimonial property was justified. The deceased spouse's estate received a payment of $10,000 (less than one-tenth of the matrimonial property) and the remaining matrimonial property valued at $120,000 was vested in the surviving spouse. *See also* *Van Meter Estate* v. *Van Meter*, (1983), 25 Sask. R. 109 (Q.B.). An application was continued by the wife's executors in consequence of her death. The value of the matrimonial property subject to disposition was approximately $252,586.00. The estate was awarded $28,000 for her share in the matrimonial property - approximately one-tenth. The balance of the matrimonial property was awarded to the surviving spouse.

It would appear that the courts have permitted a rather generous sharing of the deceased's estate on the basis that, as the predeceasing spouse is dead, any share allocated to the estate will not benefit him/her but rather will pass to his/her beneficiaries who may be strangers to the survivor and who may have made no contribution whatsoever to the assets.[120] This argument is not compelling. While it is true that after death the deceased spouse no longer has any continuing needs, we do not think that this factor alone entitles the surviving spouse to more than one-half of the shareable property. To do so would, in our opinion, permit an unwarranted encroachment on the predeceasing spouse's power of testamentary freedom.[121]

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[118] See, for example, Troendle v. Canada Permanent Trust, (1981), 11 Sask. R. 47 (Q.B.). The testator had by the terms of his will left all his property to his trustee and executor upon the trust to manage the farm and to pay the income to his wife during her lifetime and, on her death, to divide the residue equally between the children. The net value of the estate was approximately $234,000. The court held that the wife was entitled to absolute ownership of at least half of the matrimonial property but to vest half of the farm would create two uneconomical farming units. Dickson J. then overrode the provisions of the will and vested the entire estate in the wife. See also Spencer v. Spencer (1983), 34 R.F.L. (2d) 358 (Sask. Q.B.). The deceased left an estate of $334,682.00 consisting of land, machinery and cash, and he directed in his will that his wife receive the home quarter, the north 80 acres, and that the residue of his estate be transferred to his brother. The court held that it would be fair and equitable to award her all the matrimonial property as she had contributed greatly to the farm's success, and since the principal beneficiary had died there was no order which could give effect to the deceased's testamentary wishes. In addition, the court found that where one spouse is dead, this factor must weigh heavily in the court's discretion as to what, if any, distribution should be made to anyone else.

[119] Supra n. 77 at S-36 (yellow pages), footnote 184.

[120] See, for example, Van Meter Estate v. Van Meter, supra n. 117 at pp. 114-115.

Moreover, the Commission has some doubt as to the practicality or feasibility of applying the two tests which govern the unequal division of family and commercial assets where one of the spouses is dead. A recent Manitoba Court of Appeal decision appears to hold that the lack of contribution to the marriage on the part of a spouse may be invoked to vary the prima facie presumption of equal sharing of commercial assets.[122] In our view, arguments about lack of contribution to the marriage are inappropriate at death. In an accounting on death, difficult evidentiary hurdles would be encountered by the deceased's estate both in leading evidence and in cross-examination in order either to substantiate or to dispute allegations of a lack of contribution to the marriage on the part of a spouse. This difficulty of assessing the contributions of spouses to the relationship on the basis of allegations made after death may become acute, as the line between misconduct and lack of contribution becomes more and more obscure.[123]

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[121] See generally the comments of Hallet J. in Re Levy, infra n. 144 at 167:

> In this case, Mr. Levy is dead. It has been argued that as Mr. Levy no longer has any use for money, how can it be unfair to him to divide matrimonial assets equally? In my opinion, the court must consider not only what is fair to the surviving spouse, but consider what is fair to the deceased, maybe even more so than where the spouse is alive as he cannot speak from the grave. The only voice that remains is given expression to in his will; . . .

[122] Marks v. Marks, supra n. 115. The court held that it would be "clearly inequitable" for the wife to share equally in the increase in the value of the farm (e.g. a commercial asset) where she played no part in its operation, and performed less than her share of the overall responsibilities and obligations of the marriage.

There is a further and quite important factor. In our earlier recommendations we proposed that the survivor and the personal representative may agree as to the proper allocation of marital property on death without resort to a court application. We are concerned that the presence of a discretionary factor in the accounting of property on death would necessitate the need for a court application, or at the very least increase the number of applications to court. In our estimation, the presence of a discretionary power would cause the deceased's personal representative to be loathe to determine the survivor's fair share without court approval.

To import a discretionary power on death would be a novel concept as s. 15 of "The Dower Act" does not presently contemplate the exercise of any discretionary power in ascertaining the survivor's fixed share. Manitoba has had a lengthy experience with this fixed share and it has afforded a good measure of certainty to the surviving spouse. The Commission sees no compelling reason to depart from this principle. Accordingly, we recommend:

> *RECOMMENDATION 12*
>
> *That for purposes of an accounting on death, there should be no discretionary power vested in the Court to vary the equal division of family and commercial assets.*

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[123] We have observed a recent amendment to subsection 13(3) of "The Marital Property Act" which now provides as follows: "In exercising its discretion under this section, no court shall have regard to conduct on the part of a spouse, unless that conduct amounts to dissipation." It remains to be seen precisely how this amendment will influence the ruling in Marks. For a good discussion on this question, see, Matrimonial Property Law in Canada, supra n. 77 at M-44.

G. Sharing Only in Favour of The Surviving Spouse

Without a doubt cases will arise where the survivor's shareable assets exceed those of the deceased spouse. An integral question then arises as to whether or not the surviving spouse should have to pay an equalizing claim into the estate of the deceased spouse. If the surviving spouse were required to make such a payment, it could not, by the nature of things, benefit the deceased spouse; it would form part of the deceased's estate to be distributed either in accordance with the terms of the will or pursuant to the rules of intestate succession.

All of the provinces which provide for an allocation of property on death, with the apparent exception of Newfoundland,[124] appear to preclude the personal representative from commencing an action against the surviving spouse in an attempt to enforce a balancing claim.[125] Nor does the current Dower Act contemplate such an occurrence as the right to invoke the fixed share is restricted unilaterally to the survivor of the marriage partnership and does not extend to the predeceasing spouse. Both the Ontario Law Reform Commission[126] and the majority of the Alberta Institute of Law Research and Reform[127] concluded that a survivor should not be called upon to make a balancing payment into the deceased's estate. We concur with this view.

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[124] In the Newfoundland case of Re Morris Estate (1982), 41 Nfld. & P.E.I.R. 320 (Nfld. T.D.) Lang J. held that the deceased spouses estate could invoke a claim for equal sharing under subsection 19(1)(d) of The Matrimonial Property Act. For a contrary view see Sagar v. Bradley (1984), 6 D.L.R. (4th) 470 (N.S.S.C.).

[125] In Saskatchewan and New Brunswick the statute expressly provides that an action may, however, be continued by the personal representative of the deceased spouse. See The Matrimonial property Act, S.S. 1979, c. M-6.1, s. 30; Marital Property Act, S.N.B. 1980, c. M-1.1, s. 5(2).

[126] Supra n. 82 at 89.

[127] Supra n. 81 at 94.

From a practical standpoint, if the deceased spouse died wholly intestate the surviving spouse would be entitled to receive the bulk of the deceased's estate, in accordance with the provisions of "The Devolution of Estates Act". Therefore, on an intestacy it seems immaterial to deliberate as to whether the deceased's estate should be increased by means of a balancing claim, when much of it is going to be returned to the survivor in any event. Even if the deceased spouse has made a will, in a great many cases all or a good portion of the estate will also be returned to the survivor, given that the normal distributive pattern is for the deceased to leave all his/her property to the surviving spouse. In these circumstances, to require the survivor to make an equalizing payment into the deceased's estate is pointless and nothing more than an unnecessary step in the administration of the deceased's estate.[128] Moreover, if the personal representative of the deceased spouse were empowered to seek an accounting on death, the Commission fears that the personal representative might have a duty to beneficiaries and creditors of the deceased to launch the application, even though expediency might dictate otherwise.

On balance, it would appear that the issue of a balancing claim in favour of the estate is likely to be of practical importance only in those instances where the deceased has executed a will conferring benefits to third parties other than the surviving spouse or where there is a deficiency in the estate to meet the claims of estate creditors.[129] To permit an equalizing claim to be advanced by the estate of the deceased spouse would apply the principle of sharing between spouses for the benefit of third parties. The Commission has concluded that the possible diversion of property for the benefit of third parties is not among our objectives for a deferred sharing regime operative on death.

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[128] Supra n. 82 at 94.

[129] The majority of the Alberta Institute of Law Research and Reform set forth the following example: "If a husband should die insolvent because of a business failure or because he is responsible for a fatal automobile accident which renders his estate liable for huge damages, the surviving wife would have to share her economic gains with the estate for the benefit of the estate's creditors, and the majority think that that should not happen." Supra n. 81 at 93.

There is a further consideration. There may be children to be looked after who have to rely primarily upon the surviving spouse for maintenance after the death of a parent. We think that the surviving spouse should not have to turn property over to the estate which (s)he would otherwise have been able to utilize for the support of the children. This is especially so since the property of the estate may be gifted to others under the will and not available for the support of the children except by way of court application pursuant to "The Testators Family Maintenance Act". We agree with the observations of the Ontario Law Reform Commission:

> It is, of course, always possible that the deceased spouse's will might make provision for the maintenance of children. On balance, however, it would seem reasonable to place the emphasis in such cases upon the legal obligations of maintenance that are cast by death upon the surviving spouse, rather than upon the possibility that some assistance towards the discharge of these responsibilities might be contained in the will of the deceased.[130]

The principle underlying equal sharing is inherently attractive. In recommending that no equalization claim should be payable by the surviving spouse into the estate of the deceased spouse, we acknowledge that this constitutes a rather key exception to the principle of equal sharing, but as a matter of policy we support the preferred treatment of the surviving spouse in these circumstances. Accordingly, we recommend:

RECOMMENDATION 13

That, subject to the exceptions set forth in Recommendation 14, the right to seek an accounting on death does not survive the death of a spouse for the benefit of his/her estate.

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[130] Supra n. 82 at 89.

While we have determined that the right to seek an accounting should best be viewed as a personal right, extinguished by the death of the spouse, we would recommend one exception, namely, where the spouse has manifested an intention to pursue that right. This may arise where a spouse has commenced an application for an accounting of property during the spouses' joint lives or where the surviving spouse has sought an allocation of property on death, but in each case the spouse dies before the application is finally determined. We think that in these instances, the deceased's personal representative should be able to continue the action on behalf of the estate. The accounting would then be governed in accordance with the general rules respecting an allocation of property on death. Accordingly, we recommend:

RECOMMENDATION 14

That an application for an accounting commenced by the spouse before the death of that spouse or commenced by a surviving spouse after the death of the other spouse may be continued by the estate of a deceased spouse and should be determined in accordance with the proposed rules governing an accounting of property on death.

H. Relationship to Rules of Intestate Succession

A further matter to be explored is the relationship between the rules of intestate succession and the proposed regime. In order to determine precisely how the rules of intestate succession should interact with an accounting of property on death, we think it imperative to examine first the purpose for which intestate law was enacted.

The chief aim of "The Devolution of Estates Act" is to provide a rough and ready means of ensuring that in the event of an intestacy, the surviving spouse will receive a generous share of the deceased's assets. The Act is designed to reflect community views respecting what would constitute a fair distribution of property. That is, it attempts to approximate what the deceased spouse would ordinarily have provided for by will. It has been observed that:

> The extension of the rights of a surviving spouse at the expense of the children and other kin of an intestate is the most striking feature of the rules of intestate succession during this century . . . . The increased rights of a surviving spouse reflect the changed view of the family which sees marriage 'as a partnership in which husband and wife work together as equals', and regards 'the wife's contribution to the joint undertaking, in running the home and looking after the children' as being 'just as valuable as that of the husband in providing the home and supporting the family'.[131]

As we noted earlier, the fixed share of "The Dower Act" has no application on an intestacy and may not be invoked by the survivor. When the deceased spouse has died wholly intestate the survivor's share is determined by the scheme of property distribution set out in "The Devolution of Estates Act". It should be recalled that it provides a preferential share to the surviving spouse of $50,000 plus one-half of the residue of the estate if there are surviving issue. Where there are no issue, the survivor receives everything. On an intestacy, it was theoretically unnecessary to invoke the fixed share, as the rules of intestate succession already provided a primitive but equitable portion of the intestate estate to the surviving spouse.

Conceptually, determining how or even whether the property allocated under a deferred sharing scheme should be accounted for in relation to the intestate share of the surviving spouse is a perplexing task. Nova Scotia, Newfoundland and Saskatchewan all have legislation, the effect of which appears to be that the surviving spouse may assert his/her share in the marital property and, in addition, may invoke his/her intestacy benefits.[132] For example, subsection 30(3) in the Saskatchewan provision states:

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[131] J. Gareth Miller, The Machinery of Succession, (1977), at 96.

> No court shall consider the amount payable to a spouse under the Intestate Succession Act in making a distribution of matrimonial property pursuant to an application made or continued by a surviving spouse or continued by the personal representative of a deceased spouse where the deceased spouse died intestate, and no order made under this Act affects the rights of the surviving spouse on intestacy.

However, it is not entirely clear as to the order in which the two acts would be applied.

We believe that, in substance, this approach provides a potential for over-compensation and fails to recognize the intended purpose of the law of intestate succession. The distribution under "The Devolution of Estates Act" already contains, in our view, a primitive means of allocating marital property. By primitive we mean that intestate succession law acknowledges the surviving spouse's contribution to the marriage by way of a preferential and distributive share of the deceased's estate but in computing these shares it does not take into account the source of property, and the separate property accumulations of the survivor. To permit both of these applications by the survivor would, in some instances, effect a form of double recovery by entitling the spouse to two separate divisions of the deceased's estate.

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[132] Matrimonial Property Act, S.N.S. 1980, c. 9, s. 12(4); The Matrimonial Property Act, S.N. 1979, c. 32, s. 19(1)(2); The Matrimonial Property Act, S.S. 1979, c. M-6.1, s. 30(3). Some examples setting forth the possible relationship between the Nova Scotia Act and its intestacy provisions are set forth in Matrimonial Property Law in Canada supra n. 77 at NS-45.

The position in New Brunswick is not entirely clear. Subsection 4(4) provides:

> (4) Any bequest or devise contained in the last will and testament of a deceased spouse, including a specific bequest or devise, and any vesting of property provided by law upon an intestacy, is superseded by the rights prescribed in subsection (1).

It would appear that the share of a surviving spouse under the Marital Property Act supersedes or takes the place of a provision in a will, or benefit upon intestacy. However, it has been suggested that the intention is to displace the provisions of the will or intestacy benefits only to the extent that they are inconsistent with an order made on the death of a spouse. See B.D. Stapleton, "Death and Property Rights in New Brunswick, Recent Developments", (1981) 30 U.N.B. L.J. 198.

Consider the following example. Assume that Mr. Jones dies without a will leaving shareable property with a net value of $180,000. This is Mr. Jones' second marriage and his second wife and one child from a previous marriage survive him. Under the Saskatchewan Act it would appear that Mrs. Jones who has no separate property may assert her prima facie entitlement to a one-half share or $90,000 in an accounting on death and, pursuant to "The Intestate Succession Act", may also be awarded an additional $65,000.[133] Mrs. Jones has obtained some $155,000: virtually the bulk of the deceased's capital to the detriment of the child who otherwise would have received far more generous benefits.[134] Where there are issue competing with the surviving spouse, particularly issue from a previous marriage, we think that this approach presents difficulty and produces a most unsatisfactory result.

In light of this concern, our preliminary conclusion was simply to continue the two independent schemes of property distribution. This conclusion appeared to support our aim of ensuring that a surviving spouse would not be worse off on an intestacy than under the deferred sharing regime. In fact, by distributing the deceased's estate according to the provisions set forth in "The Devolution of Estates Act", the survivor would have been entitled to more. The share of the surviving spouse under intestate legislation would have been sufficiently large to include what the surviving spouse would have received under an accounting on death and something in addition thereto.[135]

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[133] Her preferential share would be $40,000 and a further $25,000 would be awarded as a distributive share.

[134] If only the Intestate Succession Act were available to the surviving spouse, the child would have been entitled to $70,000 rather than $25,000.

However, upon further consideration it became apparent that there would be one glaring deficiency in restricting the survivor to "The Devolution of Estates Act". We later recommend that the deferred sharing regime incorporate anti-avoidance measures to deal with the problem of a spouse who transfers the bulk of his/her property to others in order to reduce or eliminate the probate estate. By confining the surviving spouse to "The Devolution of Estates Act" (s)he would not be able to invoke these measures where the predeceasing spouse has disposed of the bulk of his/her assets to third parties and has died intestate. Hence, our aim of ensuring that the surviving spouse would be no worse off on an intestacy would not be achieved.

Accordingly, it is the Commission's view that the surviving spouse should be entitled to seek an allocation of property on death in the event of an intestacy, whether it be a whole or partial intestacy. This would not mean that the distributive scheme under "The Devolution of Estates Act" would be altered. Rather, the quantum of the balancing claim would first be determined in the same manner as an ordinary accounting on death and without regard to the results on an intestacy under "The Devolution of Estates Act". Having ascertained the survivor's entitlement to a balancing claim, the personal representative would proceed with the distribution of the actual assets in the intestate's estate in strict accordance with the provisions of "The Devolution of Estates Act".

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[135] For example, assume that the deceased spouse has shareable property valued at approximately $300,000 and for the sake of simplicity that the surviving spouse has no shareable estate. The deceased spouse has died without making a will. If the survivor were entitled to elect an accounting of property on death, a balancing claim of some $150,000 would be payable in his/her favour. On the other hand, a distribution of the deceased's estate in accordance with the terms of "The Devolution of Estates Act" will net the survivor $175,000 - that is, a preferential share of $50,000 plus a distributive share of $125,000 or one-half of the residue remaining after deducting the $50,000.

However, in order to prevent the surviving spouse from benefitting twice on an intestacy - once under a deferred sharing regime and then under intestate succession - we think that the surviving spouse should charge all benefits received or to be received by way of intestate succession against the balancing claim.[136] The Law Reform Commission of Saskatchewan has also recently proposed that a spouse's entitlement to matrimonial property be reduced by the amount received on an intestacy.[137] In effect, our approach would limit the surviving spouse to the greater of his/her entitlement under the deferred sharing regime or under "The Devolution of Estates Act". Since the survivor will usually succeed to more than one-half of the marital property pursuant to the provisions of "The Devolution of Estates Act", we do not anticipate that the surviving spouse will ordinarily invoke deferred sharing in the event of an intestacy.[138] As we observed earlier, it is only where substantial assets have been transferred to third parties that the gain to be derived by exercising the right to seek an accounting on death may exceed the total intestate benefits under "The Devolution of Estates Act".[138a] Accordingly, we recommend:

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[136] A somewhat similar approach is adopted under the Uniform Probate Code where the spouse can elect a share of the augmented estate even if there should be an intestacy but any benefits received by way of intestate succession are subtracted from the survivor's share of the augmented estate. Uniform Probate Code s. 2-207.

[137] Law Reform Commission of Saskatchewan, Tentative Proposals for Reform of The Matrimonial Property Act, Saskatoon, (1984) at 81. The Commission also proposed, as a consequential amendment, that the surviving spouse's preferential share under The Intestate Succession Act be increased from $40,000 to $100,000.

[138] We set forth an example at p. 148 illustrating the mechanics of accounting on death where the predeceasing spouse has died intestate and substantially reduced the net estate by channelling property to others.

> *RECOMMENDATION 15*
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> *That where the surviving spouse seeks an allocation of property on death, any balancing claim in favour of the surviving spouse should be reduced by the entitlement of the surviving spouse under "The Devolution of Estates Act".*

I. Benefits Conferred by Will

Another difficult issue to determine is the relationship between an allocation of property on death and benefits conferred by will. Should the surviving spouse be entitled to seek an allocation of property on death and then take those benefits conferred under the deceased spouse's will in his/her favour in addition to the balancing claim?

Nova Scotia and Newfoundland appear to answer this question affirmatively. For example, the Nova Scotia Act contains the following section:

> Any right the surviving spouse has to ownership or division of property under this Act is in addition to the rights that the surviving spouse has as a result of the death of the other spouse, whether these rights arise on intestacy or by will. (emphasis added)[139]

[138a] After charging all intestate benefits against the balancing claim, any deficiency remaining may be satisfied from the recipients of the anti-avoidance devices in accordance with the rules which are later set forth respecting recovery from third parties.

[139] Matrimonial Property Act, N.S. 1980, c. 9, s. 12(1)(4). The precise interaction between the Nova Scotia Matrimonial Property Act and succession legislation is uncertain. See A. Bissett-Johnson, "Death and The Matrimonial Property Act" (1977), 25 R.F.L. (2d) 182 at 190.

Although the Act makes no express provision, in Re Fraser (1981), 130 D.L.R. (3d) 665 at 673 (N.S.S.C.) it was found that a claim under The Matrimonial Property Act should first be determined so that the division of assets determines what the testator has left to dispose of.

The Ontario Law Reform Commission offered the following rationale in recommending that the survivor be entitled to both:

> The doctrine of satisfaction whereby a gift by will is "prima facie" considered satisfaction of a debt, should not apply to an equalizing claim payable under the matrimonial property regime. A person subject to this regime, making a testamentary disposition in favour of his or her spouse should be taken to intend to confer a benefit in addition to an equalizing claim that may be payable by the estate of the surviving spouse.[140]

Under Saskatchewan's present regime the court, except in the case of an intestacy, is directed to consider any benefit received or receivable by the surviving spouse as a result of the death of a spouse.[141] Presumably, the survivor's entitlement under the will would be a ground for allocating to that spouse less than an equal share of the shareable property. The Act, however, provides no guidance as to how this discretion ought to be exercised. In its recent working paper on the reform of The Matrimonial Property Act, the Law Reform Commission of Saskatchewan has addressed this concern and proposed that a spouse's entitlement to matrimonial property should be reduced by the amount received under a will.[141a]

We have also concluded that the surviving spouse should not generally be entitled to take benefits conferred under the deceased spouse's will in addition to seeking an allocation of property on death. Most spouses name their survivor as beneficiary of all or substantially all of their estate.[142] This intention should be fully respected and, of course, the survivor would be entitled to all benefits so conferred. Where, however, the surviving spouse is entitled to a significantly smaller portion of the estate, it is a reasonable inference that the deceased expressly intended that such share be so limited. Simply stated, where the deceased spouse has drawn a will setting forth the desired distribution of his/her estate, we do not think that it should be then presumed that the predeceasing spouse also wishes to confer further benefits on the surviving spouse by way of an allocation of property on death.

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[140] Supra n. 82 at 171.

[141] The Matrimonial Property Act, S.S. 1979, c. M-6.1, s. 21(2)(1). See, for example, Serdula v. Serdula Estate (1983), 23 Sask. R. 282 (Q.B.).

[141a] Supra n. 137 at 80.

[142] Provided, of course, that there are no children from a previous marriage.

Consider the following example. Assume that a husband intends to make fair provision for his spouse and bearing in mind the provisions of the proposed regime, he causes a will to be drafted with the very intent of satisfying the entitlement of his spouse under the scheme. That is, his will expressly provides that as his wife was entitled to one-half of the marital property, he left her $25,000 by way of legacy - the balance he leaves to other beneficiaries. At death, as it turns out, he has shareable property valued at some $70,000 and consequently there has been an accidental failure to leave one-half. Presumably, in Nova Scotia and Newfoundland the wife could assert an entitlement to a one-half division of the shareable property - $35,000 and then claim her $25,000 legacy devised under the deceased's will. The surviving wife may receive a total of $60,000, an amount far in excess of one-half of the shareable property and an amount which would take little recognition of the deceased's intent as to the disposition of his/her property at death.[143] While these provisions still remain largely untested, the case law to date has expressed dissatisfaction with the very occurrence of this form of over-compensation or double portion.[144]

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[143] It may be, however, that in this instance the court would exercise its discretionary power and find that an equal division of assets would be unfair or unconscionable in relation to the effect of the deceased's will. But see the comments of Hallet J. in Re Levy, infra n. 144.

[144] See generally Re Levy (1981), 25 R.F.L. (2d) 149 at 169 (N.S.S.C.) where Hallet J. felt compelled to observe that "something should be said about the provisions in the Matrimonial Property Act that allow a surviving spouse to apply for equal division in addition to the right taken by will or on intestacy". See also R.J. Downie, "Wills and The Matrimonial Property Act" (1981), 7 N.S. Law News 61.

Having determined that benefits under a will and entitlement to a deferred sharing on death should not be cumulative, the Commission considered what form of accounting should be required. Section 19 of "The Dower Act" presently requires the surviving spouse to forfeit every bequest, gift or devise conferred by way of will, when electing to take the fixed share under s. 15 of "The Dower Act". We do not think that an allocation of property on death should result in an automatic loss of benefits under the will.

In our view, with but one exception, all property acquired by the surviving spouse under the will should be charged or credited against the balancing claim. For example, in our earlier sample calculation at page 57, if the husband had devised the stock portfolio valued at $15,000 to his wife, that amount should be charged against the balancing payment of $81,500 thereby reducing it to $66,500. With this approach, the survivor would still be entitled to receive one-half of the combined shareable gains and, in our estimation, greater recognition would be given to the deceased spouse's testamentary plan.[144a] The testator's plan would be preserved insofar as it provides benefits for the surviving spouse. The spouse would not be compelled to accept the benefits devised by the deceased spouse, but if these benefits are rejected, the values involved should be charged to the surviving spouse as if the devises were accepted.[145]

We briefly noted earlier that there should be but one exception in crediting property acquired by the surviving spouse under the will against the balancing claim. We later propose that the right of the survivor to an estate for his/her life in the homestead should be independent of and in addition to the right to seek an allocation of property on death, whether the life estate should be bequeathed to the survivor by will or invoked by way of statutory entitlement. In other words, the present scheme would be maintained insofar as the survivor may invoke a share of the deceased's estate in addition to the life estate in the homestead. To achieve this end, a life interest in the homestead bequeathed to the survivor under the deceased spouse's will should not be charged against the balancing claim where the survivor seeks an allocation of property on death. Accordingly, we recommend:

[144a] For purposes of an accounting on death, it should be recalled that all benefits conferred upon the survivor under the deceased's will are included in the inventory of the deceased spouse. That is to say, the deceased's inventory is compiled without considering the provisions of the will.

[145] This approach is also adopted under the Uniform Probate Code section 2-207.

RECOMMENDATION 16

That, except for a life estate in the homestead, every bequest, gift or devise contained in the deceased spouse's will which passes or has passed to the surviving spouse or which would have passed to the surviving spouse but was renounced should be charged against the balancing claim.

J. Role of "The Testators Family Maintenance Act"

The Commission has studied what role, if any, "The Testators Family Maintenance Act" should play under a deferred sharing regime operative on death. At death, there would appear to be two separate, though closely linked, elements involved, namely the determination of property rights and the consideration of support obligations.

We think that the first step should be to ascertain the property rights of the surviving spouse. Once that has been determined, the next step should be to consider the possibility that, after the allocation of marital property on death, the surviving spouse might have a further need for support and maintenance. Even where there has been a division of property on death there may still be instances where the allocation of property is inadequate to provide proper maintenance and support. This is particularly so in the event of smaller estates.

Accordingly, the surviving spouse should be permitted to join an application under "The Testators Family Maintenance Act" with an application to seek an accounting of property at death. The court should, however, in considering the survivor's application under "The Testators Family Maintenance Act", be directed to take into consideration any balancing payment in favour of the surviving spouse pursuant to an allocation of marital property on death. Once a distribution of property on death has been effected, we do not foresee that the court would ordinarily award further provision under "The Testators Family Maintenance Act". Further provision should be confined to those instances where the surviving spouse does not have adequate provision for his/her proper maintenance and support. Accordingly, we recommend:

RECOMMENDATION 17

That an accounting of property on death should not bar the right of the surviving spouse to make an application under "The Testators Family Maintenance Act".

RECOMMENDATION 18

That an application under "The Testators Family Maintenance Act" may be joined with an application to seek an accounting of property on death.

RECOMMENDATION 19

That an amendment be made to "The Testators Family Maintenance Act" to provide that the Court, in determining whether adequate provision for the proper maintenance and support of the surviving spouse has been made, should have regard to any allocation of property received by the surviving spouse by virtue of an accounting on death.

K. Priority of Balancing Payment

The Commission proposes that a balancing claim in favour of the surviving spouse should take precedence over any bequest or devise contained in the deceased spouse's will and over any application by a dependant under "The Testators Family Maintenance Act". Once the funeral and testamentary expenses have been paid and the claims of third party creditors have been satisfied or taken into account the survivor would then step in. We think that the main concern should be to ensure that the surviving spouse's efforts and contributions to the marriage are recognized by a priority division of marital property.

We do not feel that this approach would place dependent children in jeopardy for the following reasons. First, where the minor children are also issue of the survivor, the surviving spouse will have a legal obligation to maintain and support them.[146] Second, dependent children will have a further avenue of recourse. After the payment of the balancing claim, an application under "The Testators Family Maintenance Act" may be sought respecting the balance of the deceased spouse's property.

Priority over all bequests and devises contained in the deceased spouse's will is presently effected through s. 21 of "The Dower Act" which provides as follows:

> Where a widow becomes entitled to receive under s. 15 from her husband's executor the share of his net real and personal property for which provision is made in that section, that share shall, insofar as the beneficiaries under the will are concerned, be considered and construed as if it were a debt of the testator at the time of his death, and is payable next after all the debts of the deceased, and has priority over all bequests, gifts, and devises contained in the will.

We think this is an effective method and a similar provision could usefully be incorporated into the proposed scheme. Accordingly, we recommend:

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[146] Where the deceased spouse has dependent children from a previous marriage, an order for the support of such children pursuant to "The Family Maintenance Act" or the Divorce Act, R.S.C. 1970 c. D-8 s. 11(1), may expressly provide that the obligation is to continue after the death of the payor spouse and to be a debt of the estate for such period as is fixed in the order. Such a debt would be treated like any other enforceable claim of a creditor under the regime and would be granted priority over the balancing claim in favour of the surviving spouse.

RECOMMENDATION 20

> *That a balancing payment should have priority over all bequests, gifts and devises contained in the deceased spouse's will.*

We briefly noted earlier that considerable uncertainty exists with respect to the application of s. 22 of "The Testators Family Maintenance Act". Subsection 22(1) provides as follows:

> No order shall be made that has the effect of reducing the interest of a husband or wife in the estate of a testator to an amount that, in the opinion of the judge is less than the share to which the husband or wife would have been entitled under "The Dower Act", should he or she elect to take under that Act.

The case law is inconclusive as to whether this section ensures that the surviving spouse, making application under "The Testators Family Maintenance Act", will receive at least the minimum entitlement to that share of the estate which (s)he would have otherwise received pursuant to the fixed share under "The Dower Act".[147] Nor is it clear whether this section would preclude an application by a dependant child from encroaching upon the survivor's fixed share.

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[147] See Pope v. Stevens (1954), 14 W.W.R. 71 at 84 (Man. C.A.) where Montague J.A. states that:

> The provision for maintenance ordered, no matter which 'way' is directed to be used, must produce for the widow at least the amount of income that would have accrued to her from one-third of her husband's net estate had she received such one-third as a result of electing to take under s. 13 of "The Dower Act".
>
> I would hold that the applicant is not entitled to receive, as property absolutely her own, a third of her husband's estate.

See also In Re Lawther, [1947] 1 W.W.R. 577 at 594 (Man. K.B.); In Re Blackmore, [1948] 1 W.W.R. 1001 at 1011 (Man. K.B.).; In Re Estate of Morris Polonsky, Man. Q.B. unreported, September 24, 1976.

But see Adamson, J.A.'s comments in Pope v. Stevens, id., at 73:

> I am, therefore, of the view that the order referred to in sec. 22 of "The Testators Family Maintenance Act" is an order made for the maintenance of some dependant other than a spouse. The intention of the section is that such an order shall not interfere with or reduce a spouse's rights under "The Dower Act". It does not limit the wide discretion given under the sections above referred to except in that respect. Had there been an intention to limit the discretion given under the sections mentioned above, it would have been simple to say that an order for the benefit of a spouse shall never be less than he or she would have been entitled to under "The Dower Act".

The Commission is of the view that the authority of the Court under "The Testators Family Maintenance Act" to award provision for a dependant should be subject to the right of a surviving spouse to seek and receive his/her balancing payment. There should be no encroachment upon the surviving spouse's priority position by other dependants. A consequential amendment is therefore necessary to ensure that any entitlement to an accounting on death is first determined before an application under "The Testators Family Maintenance Act" is resolved. From the surviving spouse's perspective, it is only after the entitlement to an accounting has been assessed that a determination can be made as to whether or not the survivor is in need of further support and maintenance. Accordingly, we recommend:

RECOMMENDATION 21

That "The Testators Family Maintenance Act" be amended to reflect that the authority of the court under that Act is subject to the right of a surviving spouse to seek an allocation of property on death.

L. Incidence or Burden of a Balancing Payment

The Commission has examined the possibility that there may well be instances where the personal representative is unable to effect the payment of the survivor's equalizing claim without interfering with the distribution of the deceased spouse's estate as set out in the will. It remains to determine precisely how the equalization claim should be satisfied in such instances.

Under "The Dower Act", the fixed share is a charge on all the assets of the estate to be paid on a pro rata basis.[148] There is surprisingly little articulated consideration of this matter in the various law reform commission reports and the only statutory provision appears in the New Brunswick legislation.[149] Subsection 4(5) of the New Brunswick Act provides:

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[148] Canada Permanent Trust Company v. Kerrie et al, [1977] 4 W.W.R. 555 (Man. C.C.).

> Subject to subsection (4), in determining any matter respecting the division of marital property under subsection (1) the Court shall, as far as is practicable, divide the property so that the express wishes of the testator may be honoured in respect of specific devises and bequests and the administration of property on behalf of the beneficiaries.

We think that this statutory provision does not afford enough practical guidance to the court.[150]

An interesting approach is adopted in section 11 of "The Testators Family Maintenance Act" in regard to the allocation of the burden or incidence of any provision for maintenance which is ordered. The section provides that unless the judge otherwise determines, the order is to fall rateably upon the whole estate.[151] There is a further discretionary power which permits the judge to relieve or exonerate any part of the testator's estate from the incidence of the order.

The Commission favours this general approach of rateable allocation tempered by judicial discretion in order to satisfy a balancing payment. On the whole, it is our view that it is far more equitable for all concerned if the starting point be that the burden shall be borne by the persons beneficially entitled to the estate in proportion to the value of their respective interests in the estate. However, we acknowledge that in some instances a discretionary power is desirable. We would narrow the application of this judicial discretion to those cases where a rateable allocation of the burden would clearly interfere with the deceased spouse's intention as evidenced in the will.[152] To the extent that it is possible to ascertain the deceased spouse's intention from the will, we think that a discretionary power may be employed to relieve any portion of the deceased spouse's estate from the burden of an order. Accordingly, we recommend:

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[149] Ontario recommended if the payment of an equalizing claim would leave insufficient property in the hands of an executor to make the specific or general distribution directed by the testator in the will, then the ordinary rules of abatement should apply. _Supra_ n. 82 at 172.

[150] The caselaw has also expressed dissatisfaction with the lack of legislative guidance. _See_, for example, _Re Levy_, _supra_ n. 144 at 170.

[151] By whole estate we mean the value of the deceased's estate after deduction of the liabilities of the estate.

> *RECOMMENDATION 22*
>
> *That unless a contrary intention appears from the will of a deceased spouse, the incidence of any balancing payment made after the death of a spouse should fall rateably upon the whole estate, other than that portion, if any, of the estate to which the surviving spouse is entitled.*
>
> *RECOMMENDATION 23*
>
> *That where a contrary intention appears in the will, the judge may order that the balancing payment be made out of and charged against any portion of the estate in such proportion and in such manner as seems proper.*

M. Earlier Property Settlement; No Entitlement to an Accounting on Death

The Commission has considered the question as to whether there should be any entitlement to an accounting of property on death where the spouses were living separate and apart as at the date of death but had not sought or obtained a divorce. We earlier observed that section 22 of "The Dower Act" plays a very decisive role in disentitling a surviving spouse to the fixed share. It should be recalled that where the surviving spouse has deserted or abandoned the deceased spouse without reasonable or just cause then (s)he will be taken to have forfeited both the fixed share and the life estate in the homestead. In effect, "The Dower Act" has incorporated the element of fault or misconduct which punishes the "guilty" spouse by precluding the operation of the fixed share. The Commission does not think it a particularly appropriate task of the law to attempt to punish marital fault by withholding property rights on death.

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[152] For example, the deceased spouse may provide the manner in which his gifts are to abate for the payment of debts. From this, the court may infer that the deceased intended to attach greater importance to those gifts.

Even where the surviving spouse has not violated section 22, it is our view that the policy of the Act ignores the usual intention of separated spouses, namely, that property acquired after separation should not be shareable. Consequently, in Re Williams Estate the widow of the deceased from whom she was separated for some 33 years was able to obtain one-half of the deceased's net estate at death which totalled over $200,000.[153]

Moreover, "The Dower Act" expressly contemplates that the separated surviving spouse who has earlier obtained a distribution of property in an accounting under "The Marital Property Act" may seek a further share of the deceased spouse's estate on death. Provided that the surviving spouse is not precluded from electing the fixed share under "The Dower Act", (s)he must account for all benefits received by virtue of a division of assets under "The Marital Property Act" in computing the quantum of the fixed share. We can see no reason why there should be two separate divisions of the deceased's property - one on marriage breakdown and then a further sharing on death.

In our estimation, the determining factor as to whether a separated spouse should be entitled to an allocation of property on death should be an earlier property settlement effected by the spouses. A surviving spouse should not be disqualified by reason of separation alone or by reason of immoral or improper conduct. Where spouses have sought and effected a division of marital property during their joint lives, for the most part, they wish to effect a final settlement of their affairs. The usual intention is that their after-acquired property should be owned separately. We think that parties to a marriage should be able to rely on the finality of an earlier property division and should be able to dispose of or deal with their property on death as they see fit.[153a]

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[153] Supra n. 50.

[153a] It should be recalled that in the appropriate circumstances a separated surviving spouse might be awarded further provision for his/her proper maintenance and support under "The Testators Family Maintenance Act".

Therefore, the Commission has concluded that a complete property settlement entered into after or in anticipation of separation or divorce should operate as a complete waiver of all rights to an equal distribution of assets on death, in the absence of reconciliation.[154] If there has been no earlier division of property by agreement or court order, the surviving spouse's entitlement to an allocation of property on death remains. Where there has been a separation and an earlier property settlement but the parties resume cohabitation, the surviving spouse should be able to seek an accounting on death with respect to the property acquired after the resumption of cohabitation. Accordingly we recommend:

> *RECOMMENDATION 24*
>
> *That where there has been a complete property settlement by way of court order or separation agreement, no accounting of property on death may be sought by the surviving spouse unless the spouses have resumed cohabitation after the property settlement was made.*
>
> *RECOMMENDATION 25*
>
> *That where the spouses have resumed cohabitation after effecting a complete property settlement, an accounting of after-acquired property may be sought on death by the surviving spouse if the reconciliation is subsisting at the time of the deceased's death.*

N. Notice

We think it important that the surviving spouse should be advised of his/her entitlement to seek an allocation of property on death.[155]

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[154] This approach is also adopted under the Uniform Probate Code s. 2-204.

[155] Of course, it is to be remembered that it is not in every case that the survivor would in fact receive a balancing claim in his/her favour. Entitlement will depend upon the extent of the survivor's own shareable gains and those of the deceased as well as the extent to which benefits, if any, are conferred upon the survivor by way of the deceased's will.

Laws intended to provide rights to persons should be known by or communicated to the persons who should benefit.[156] In our view, it would be appropriate to place an obligation on the deceased's personal representative to ensure that such a notice is ordinarily sent to the surviving spouse before the expiry of one month after issuance of the grant of probate or the letters of administration.[157] The required notice should be set forth in a form attached to the Act and would summarily set out the rights of the surviving spouse under the proposed deferred sharing regime on death.[158] The manner of effecting service of the notice would be a matter to be provided for by the rules of court. Where the surviving spouse is the deceased's personal representative then there would, of course, be no requirement to send a notice to himself/herself. In most cases the status and location of the surviving spouse is a matter of common knowledge. However, where a surviving spouse cannot be found after reasonable efforts have been made, we think that the court should be given the direction to dispense with the notice of election. Accordingly, we recommend:

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[156] While it would appear that neither "The Dower Act" nor the Court Rules set forth an express obligation on the personal representative to serve a notice of election upon the surviving spouse, the survivor's right to elect is clearly limited once such a notice has been furnished. The survivor has three months after such notice has been served to determine whether (s)he desires to take under the Act or under the will. There is a standard form of election set out in section 17(2) which election must be filed within the three month period in The Court of Queen's Bench. Should the survivor fail to make the election within the stipulated three month period, (s)he shall be deemed to be a consenting party to the provisions of the deceased's will.

In accordance with s. 17(1), it would seem that such a notice need only be served "in a case to which section 15 applies". However, even where it is clear that the survivor is entitled to a fixed share, the Act is silent as to the time frame within which the personal representative must cause the notice of election to be served upon the survivor. Where the personal representative has failed to send notice within one year from the granting of probate, any person interested in the estate may apply to the Court for an order directing the survivor to elect.

[157] The failure of the deceased's personal representative to send the required notice may be tantamount to a breach of the duty of administration of a breach of trust. Depending upon the facts and circumstances of each particular case, should the surviving spouse suffer any loss, the deceased's personal representative may be held personally accountable.

RECOMMENDATION 26

That subject to recommendation 27, before the expiry of one month after issuance of the grant of probate or letters of administration, the deceased spouse's personal representative shall cause a notice, summarily setting forth the surviving spouse's entitlement to an accounting of property on death, to be served upon the surviving spouse in the form and manner prescribed by the rules of court.

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[158] A somewhat similar approach is adopted under Rule 64(2) pursuant to "The Court of Queen's Bench Surrogate Practice Act" which obliges the solicitor of the personal representative to send a form notice setting forth some of the rights concerning the beneficiaries of the estate.

We have also observed Court Rules 10(2) and 10(3) which provide in part as follows:

> 10(2) The court . . . may order that any or all those persons be served with a copy of the will and copies of any statutes or parts of statutes that might, in the opinion of the court, affect the interests of those persons.
>
> 10(3) The court may require that a widow be provided with independent counsel, and that any expenses so incurred be paid out of the estate, as the court may direct.

RECOMMENDATION 27

That where, in the opinion of the court, every reasonable effort has been made to serve the notice on the surviving spouse, the court may dispense with the requirement of such notice in respect of the surviving spouse who has not been served.

In addition, it is our view that it would be very useful if there were a means by which the surviving spouse could formally indicate whether or not it was his/her intention to seek an allocation of property on death. An appropriate mechanism would be somewhat similar to that presently found under section 17(2) of "The Dower Act". What we envisage is a standard form of election to be signed by the surviving spouse which formally confirms his/her decision. This election would then be filed in the office of the deputy registrar of the appropriate judicial centre and the deputy registrar would be required to give any person applying therefor a certificate showing what election, if any, has been made.

Having filed an election which confirms the will, the survivor would be deemed to be a consenting party to the provisions of the will and the survivor would have no further rights except as conferred expressly under the will. The real merit in such a scheme is that the personal representative would be free to proceed with the distribution of the estate in accordance with the terms of the will, where the survivor has filed the appropriate form confirming the intention not to seek an accounting. This would serve to encourage the prompt distribution of the deceased's estate. We do not suggest, however, that this formal filing be mandatory in the sense that it be a necessary prerequisite in order to seek an accounting. Accordingly, we recommend:

RECOMMENDATION 28

That the surviving spouse may file a written election in the form prescribed by the Rules of Court as to whether (s)he desires to seek an accounting on death; and where the surviving spouse elects not to seek an accounting, (s)he should be deemed to be a consenting party to the provisions of the will and the surviving spouse has no rights except as given him/her under the will.

RECOMMENDATION 29

That such an election should be filed in the office of the deputy registrar in the appropriate judicial centre and the deputy registrar should give to any person applying therefor a certificate showing what election, if any, has been made.

O. Disclosure of Property

Having received a notice of a possible entitlement to an allocation of property on death, the survivor must then determine whether there is any merit in seeking an accounting. Complete disclosure of each spouse's property is required in order to determine the accurate allocation of property on death. While the grant of probate sets forth full particulars concerning the nature and extent of the deceased's probate estate, no mention is made of non-probate transfers, such as property held in a joint tenancy. Many details respecting the ownership of property may be within the sole possession of either the surviving spouse or the deceased's personal representative. In particular, the deceased's personal representative would not necessarily have a precise picture as to the extent of the survivor's own property acquisitions. The Commission has decided, therefore, that if the surviving spouse wishes to seek an accounting on death, both the survivor and the deceased's personal representative may be called upon by written notice to provide each other with an inventory which discloses fully each spouse's property.[159]

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[159] A recent amendment to subsection 17(4) of "The Marital Property Act" now requires a spouse, at the time of making a court application, to file a sworn statement disclosing all assets and liabilities. We earlier recommended that a distribution of property on death may be determined by the survivor and the personal representative without resort to a court application. In view of this recommendation and in the interest of effecting the prompt administration and distribution of the deceased's estate, we favour written notification as the triggering event rather than the filing of a court application.

We wish to emphasize, however, that this disclosure is only triggered where the surviving spouse wishes to seek an accounting on death. It is not intended that the deceased's personal representative should be entitled to disclosure of the survivor's assets where no accounting is sought.

The inventory of property should be a sworn document. In particular, the statement should set out the particulars of all property owned by the spouse whether or not it is shareable under the proposed regime and irrespective of whether it is situated in Manitoba or elsewhere. As well, the deceased's personal representative should set forth all will substitute arrangements of which (s)he is aware. All relevant values together with all outstanding debts and liabilities should be included. We think that this statement should be set forth in a form prescribed by the Rules of Court.[160] Accordingly, we recommend:

RECOMMENDATION 30

That where the surviving spouse wishes to seek an accounting on death, both the surviving spouse and the deceased's personal representative have the mutual obligation to provide each other, upon written request from the other, with a sworn statement that makes full disclosure of all property and debts of the spouse in the manner and form prescribed by the Rules of Court.

P. Timing of Application

It remains to consider the appropriate time period within which an application for an accounting on death could be commenced. It is intended that the surviving spouse and the deceased's personal representative will agree as to the proper allocation of property on death in accordance with the proposed rules, without resort to a court application. However, there will undoubtedly arise cases where no settlement can be effected by the parties.

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[160] Reference may be made to a rather detailed statement found in the Appendices and Forms of Alberta's Matrimonial Property Act, R.S.A. 1980, c. M-9.

In our view, an application should be brought within six months from the grant of probate of the will or six months from the issuance of the letters of administration as it is a convenient and easily ascertainable date. This coincides with the period within which an application must be made by a dependant under "The Testators Family Maintenance Act".

We think that this period is a fair one in that it will serve to promote the prompt administration and distribution of the estate. It does not unduly delay administration in the event that the surviving spouse and the personal representative cannot agree as to the equal division of marital property since during that period creditors can be paid and beneficiaries of the estate sought. Where a balancing claim is payable in favour of the surviving spouse, (s)he has six months to reach an agreement with the deceased's personal representative failing which an application must be filed within that six-month period. Accordingly, we recommend:

RECOMMENDATION 31

That subject to the exceptions set forth in recommendation 32, no application to seek an accounting of property on death should be commenced against the estate of the deceased spouse after six months from the grant of probate of the will or issuance of the letters of administration.

Q. Extension

Situations are sure to arise where the limitation period will have lapsed and, in the absence of fault on the part of the surviving spouse, the application is barred. The Commission believes that in defined circumstances the court should be permitted to allow an application which is out of time. In our estimation, the foundation of the jurisdiction to extend the limitation period should be dependent upon a lack of knowledge or notice of the occurrence of the death of a spouse or by reason of the failure of the deceased's personal representative to send the required notice setting forth the survivor's possible entitlement to an accounting or by circumstances reasonably beyond the spouse's control. In addition, we think that there should be a discretion to extend the limitation period where, after the lapse of the limitation period there is the discovery of shareable property, belonging to the deceased spouse at the time of his/her death, which was not included in the inventory submitted for the grant of probate or administration.[161]

However, an order made pursuant to an application brought outside the six month limitation period should bind only undistributed assets.[162] By undistributed assets we mean property which the personal representative is still holding in that capacity or as a "trustee". If all the deceased's property has been transferred to the respective beneficiaries or to other persons as trustees then no late application may be made. This would mean that the surviving spouse's balancing claim would be determined by evaluating all of the deceased spouse's shareable property, that is, all assets whether distributed or undistributed. The survivor, however, would take no more than the total value of the assets still undistributed. Accordingly, we recommend:

RECOMMENDATION 32

That where the survivor is prevented:

(a) by lack of knowledge of the occurrence of the death of a spouse; or

(b) by the failure of the deceased spouse's personal representative to serve the required notice set forth in recommendation 26; or

(c) by circumstances reasonably beyond the spouse's control; or

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[161] For example, the discovery of a substantial asset may well mean that a balancing claim is now payable in favour of the surviving spouse which otherwise was not available.

[162] The present Dower Act is silent on the question as to whether the survivor's fixed share could be satisfied from distributed assets.

(d) by reason of the discovery, after the lapse of the limitation period, of shareable property belonging to the deceased spouse;

from commencing an application within six months of the grant of probate or the issuance of the letters of administration, the court may extend the period by such length of time as it deems fit as to any portion of the estate remaining undistributed at the date of the application.

RECOMMENDATION 33

That for purposes of an application made after the six months from the grant of probate or the issuance of the letters of administration, assets of the estate held by the personal representative of the deceased as trustee should be deemed to be undistributed.

R. Distribution by the Personal Representative

Broadly stated, the task of the personal representative of the deceased is to gather in the assets, to discharge funeral and testamentary expenses and debts and to distribute the remaining assets among the persons entitled. We appreciate that it would be a rare case indeed where the deceased's personal representative would proceed with distribution of the estate, despite objection from the surviving spouse who wishes to seek an allocation of property or objection from a beneficiary.[163] Nonetheless, the Commission wants to ensure that any order ultimately made by the Court as to the allocation of property on death will not be jeopardized by a hasty distribution of the deceased's estate prior to the lapse of the limitation period.[164] We have therefore considered the merit of incorporating a statutory provision which would inhibit the deceased's personal representative from distributing the estate where there is the possibility or expectation that an application will be made to determine an accounting of property on death.[165]

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[163] The beneficiary, for example, may object to the inclusion of certain property in the deceased's inventory as it is not shareable and therefore wishes to have the court oversee the allocation.

[164] Of course, where the survivor has filed an election confirming the provisions of the will, the deceased's personal representative would be free to proceed with the distribution of the deceased's estate.

One safeguard which we examined is found in s. 9 of "The Testators Family Maintenance Act" which reads as follows:

> Where an application is made and notice thereof is served on the executor or trustee of the estate of the testator, he shall not, after service of the notice upon him, proceed with the distribution of the estate until the judge has disposed of the application.

"The Testators Family Maintenance Act" also provides a six month limitation period for the making of an application and an extension of this period may be allowed as to any portion of the estate remaining undistributed. The combined effect of these statutory provisions is to inhibit the deceased spouse's personal representative from taking precipitous actions to distribute the estate where there is the expectation of an application being filed.[166] Where the personal representative distributes the estate in such a case, it is done at his/her peril.[167] After the expiry of the six month limitation period, the deceased's personal representative is free to distribute the estate unless and until notice of an application has been received.

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[165] It should be recalled that there is one convenient method to ascertain whether or not a balancing claim is payable in favour of the survivor. Provided anti-avoidance devices have not been employed, the personal representative need only review the inventory of property submitted for probate; where the deceased has conferred at least one-half of the estate by way of will to the survivor, no balancing claim would be payable.

[166] A strict reading of this section would indicate that it is not notice of an intention to apply which forbids distribution, but only notice of the actual application. The courts, however, have refused to limit the effect of this section.

To ensure that the personal representative takes all precaution to guard and preserve not only the interests of the named beneficiaries but also the surviving spouse, the Commission favours the inclusion of a similar statutory provision. Even where an application has been filed, it is only the distribution which is halted. The payment of debts, funeral and testamentary expenses and the other components of the process of administration would not be affected. Accordingly, we recommend:

RECOMMENDATION 34

That the personal representative should not encumber or distribute any portion of the estate to a beneficiary before the expiry of the limitation period where there is the expectation or possibility that an application for an accounting on death may be sought.

S. Application of a Deferred Sharing Regime

1. Habitual residence of spouses

Spouses may live in Manitoba throughout their married lives. They may live in Manitoba for a period of time and then venture to another province, or they may live for a time elsewhere and then journey to Manitoba. On the death of a spouse, should the surviving spouse in each instance be entitled to an allocation of property under the proposed regime?

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[167] The personal representative is liable to account for any loss suffered, unless there is a clear disclaimer by all potential applicants. See Gilles v. Althouse (1975), 53 D.L.R. (3d) 410 (S.C.C.); Mazur and Boreski v. Mazur Estate (1980), 3 Man. R. (2d) 67 (C.A.); Re Dentinger (1981), 10 E.T.R. 6 (Ont. Surr. Ct.). See generally, Simon v. National Provincial Bank Ltd., [1950] 1 Ch. 38.

In order to resolve this question, the Commission considered what connection must exist between spouses and a province before the deferred sharing on death should apply. There appears to be a dearth of conflict provisions under "The Dower Act". The present Act does not limit its operation to husbands domiciled in Manitoba or wives resident in the province. Consequently, a foreign widow may claim a fixed share under "The Dower Act" in immovable property owned by the predeceasing spouse in Manitoba.[168]

"The Marital Property Act" adopts a jurisdictional approach by identifying the nexus required to exist between the spouses and the province before the provincial regime is applicable. "The Marital Property Act" applies to spouses only if the habitual residence of both spouses is in Manitoba; where the spouses have different habitual residences, if the last common habitual residence was in Manitoba; or where the spouses have different habitual residences and have not established a common residence since their marriage, if the habitual residence of both at the time of their marriage was in Manitoba.[169] By virtue of the recently enacted "Domicile and Habitual Residence Act", habitual residence is now presumed to mean "the state and a subdivision thereof in which that person's principal home is situated and in which that person intends to reside".[170] Provided the requisite nexus exists, the Act applies whether the spouses were married before or after deferred sharing came into force and irrespective of where the spouses were married.

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[168] See In re Elder Estate, supra n. 66.

[169] "The Marital Property Act", C.C.S.M. c. M45, s. 2(1). The effect of this section was considered by Wilson J. in Wolch v. Wolch (1980), 19 R.F.L. (2d) 307 (Man. Q.B.), var'd on other grounds (1981), 20 R.F.L. (2d) 325 (C.A.). This section would preclude a spouse who separated from his spouse in another jurisdiction from moving into Manitoba and making a claim under the Act.

[170] Unless a contrary intention is shown, a person is presumed to intend to reside indefinitely in the state and subdivision thereof in which that person's principal home is situated. "The Domicile and Habitual Residence Act", C.C.S.M. c. D96, s. 8(1) and 8(2).

We think it important for the proposed deferred sharing regime on death to specify clearly the circumstances in which it will govern particular spouses' rights. In our view, the approach taken under "The Marital Property Act" is a satisfactory way of solving the conflict problems. Accordingly, we recommend:

RECOMMENDATION 35

That subject to the exception in recommendation 89, the proposed deferred sharing regime on death should apply to all spouses, whether married before or after the coming into force of the proposed regime and whether married within Manitoba or a jurisdiction outside of Manitoba,

(a) if the habitual residence of both spouses is in Manitoba,

(b) where each of the spouses has a different habitual residence, if the last common habitual residence of the spouses was in Manitoba; or

(c) where each of the spouses has a different habitual residence and the spouses have not established a common habitual residence since the solemnization of their marriage, if the habitual residence of both at the time of the solemnization was in Manitoba.

2. Void, voidable marriages

It remains to examine whether the survivor of a void or a voidable marriage should be entitled to seek an allocation of property on death. Depending upon the ground of annulment, a decree of nullity declares the married status which both (or at least one) of the spouses intended to be valid is either void from the beginning or is voidable.[170a]

[170a] In the former case, the marriage is regarded as never having taken place and the decree of nullity is purely declaratory. In the latter, a marriage with all its consequences comes into being but is, on a decree of nullity being made, wiped off the slate as if it had never existed.

While it is true that either of the parties to a void marriage may sue for a decree of nullity, so may any third party with a pecuniary or status interest, either during the lifetime of the "spouses" or even after their death.[170b] Consequently, beneficiaries under the deceased's will may challenge the validity of the marriage with the hope of securing additional benefits under the deceased's will. On the other hand, a voidable marriage may only be annulled at the instance of one of the spouses and then only while both are still alive.[170c] Accordingly, our examination is restricted to whether the proposed regime should apply to the survivor of a void marriage; if no decree of nullity is pronounced during the lifetime of both spouses, the voidable marriage becomes unimpeachable as soon as one of the spouses dies.[170d]

At common law, on the death of one of the parties to a marriage that is void, the survivor would not have been entitled to dower or curtesy, as the case may be, in the estate of the deceased spouse.[170e] Similarly, we think it fair to state that in the case of a void marriage there would be no entitlement to a fixed share of the deceased's estate pursuant to the provisions of "The Dower Act".

The enactment of "The Marital Property Act" has, however, provided proprietary rights to parties of a void marriage. Subject to one important proviso, subsection 2(3) of "The Marital Property Act" expressly provides that parties to a marriage that is void ab initio may seek an accounting during their joint lives. The proviso precludes a party to a void marriage from invoking an accounting under the Act where (s)he knows or has reason to believe when the marriage was solemnized that it was void.

[170b] H.R. Hahlo, "Nullity of Marriage" in Studies in Canadian Family Law, Derek Mendes Da Costa (ed.), (1972) 651 at 687.

[170c] Id. at 688.

[170d] It would follow that the surviving "spouse" of such a marriage which has not been annulled would be entitled to an allocation of property on death under the proposed regime.

[170e] Supra n. 170b at 686.

In our estimation, if a party to a void marriage may seek an allocation of property on marriage breakdown during the spouses' joint lives, then the survivor of such marriage should also be entitled to invoke an accounting where the marriage is dissolved by death. It would not be just to exclude from the deferred sharing regime on death a purported "spouse" who thought (s)he was making a legally and socially recognized marriage commitment and intended to do so, but whose marriage attempt turns out to have been ineffective. We would, however, prohibit the party, who knew or had reason to believe that the marriage was void when it was solemnized, from any entitlement under the proposed deferred sharing regime. Accordingly, we recommend:

> *RECOMMENDATION 36*
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> *That the deferred sharing regime on death should apply to a marriage notwithstanding that it is void, so long as the parties believe the marriage to be valid; and if either party knows or has reason to believe when the marriage is solemnized that it is void, that party should not be entitled to any allocation of property under the proposed regime.*

T. Contracting Out

An important question arises as to whether the spouses should be able to contract out of a deferred sharing regime on death. The right to opt out is currently recognized under both "The Dower Act" and "The Marital Property Act". Section 23 of "The Dower Act" provides that a spouse, either before or after the marriage, for valuable consideration, may release or contract out of the fixed share;[171] while subsections 5(1) and 5(2) of "The Marital

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[171] Section 23 of "The Dower Act" permits spouses to release or contract out of all rights under the Act other than those provided under section 6. Subsections 6(1) and 6(4) permit the release of rights in the homestead for adequate valuable consideration.

A marriage contract to avoid the provisions of "The Dower Act" had been held not to violate public policy, even before the legislature sanctioned such contracting out of dower rights. In Stern v. Sheps et al (1967), 58 W.W.R. 612 (Man. C.A.) aff'd [1968] S.C.R. 834, it was held that the immediate prospect of marriage constituted valid consideration.

Property Act" permit spouses to exclude the application of the Act or to make the Act inapplicable with respect to assets disposed of by way of a "spousal agreement". A spousal agreement is defined to include any marriage contract, marital agreement, separation agreement, release or quit claim deed.

It is our view that spouses should remain free to contract out and to define their property rights by way of mutual agreement. This would serve to facilitate spouses who wish to frame an estate plan. We do not, however, think it appropriate that a spouse should unilaterally be able to opt out of the proposed regime in the manner set forth under section 16 of "The Dower Act". It should be recalled that if the testator had advanced or bequeathed to the survivor any of the specified sums of money in accordance with section 16 of the Act, such funds were seen as full satisfaction of any entitlement to a fixed share under section 15. It is the Commission's view that the spouse's mutual agreement to contract out should govern, not the unilateral desire of a spouse to ensure that his/her will is immune from invalidation through the provision of somewhat arbitrary monetary sums. Hence, those wills executed prior to the commencement of the proposed regime which incorporate such schemes should be reviewed. In the absence of any mutual agreement, the deferred sharing regime should be applicable on death.

Having determined that spouses should remain free to contract out by way of mutual agreement, we believe that there must be some precautions to ensure that a spouse understands the effect of any agreement which may adversely affect the rights of that spouse. Agreements between spouses should be approached with caution. The days preceding a wedding or those following a marriage that has begun to collapse are highly charged with stress and emotion which may cloud a reasoned and rational assessment of the matters in issue.

Under contract law a spousal agreement entered into in such circumstances cannot generally be set aside simply on the basis that it is unfair to one of the spouses.[171a] If the transaction were an unconscionable one because of the large inequality of values exchanged combined with one party having taken unfair advantage of the ignorance, need or distress of the other, the court may then intervene.

Rather than predicating the validity and enforceability of a spousal agreement on the obtaining of independent legal advice, it is the view of the Commission that it would be more appropriate to presume the inequality of bargaining power between spouses where the spouses have not obtained independent legal advice. In other words, the court should have the power to override a spousal agreement where it was substantially unfair at the time it was entered into and where the spouse who challenges the agreement entered into it without obtaining independent legal advice. This is the approach recently proposed by the Law Reform Commission of Saskatchewan. The Saskatchewan Commission notes that it is reasonable to presume unfair advantage in the special context of agreements between spouses, because the circumstances of such agreements are so often charged with stress and emotion, and influenced by the very intimacy of the relationship. On the other hand, where each spouse has obtained independent legal advice, no such presumption would be appropriate.[172] Where spouses have sought independent legal advice, the spousal agreement could only be set aside on traditional contractual grounds such as undue influence, duress and unconscionability.[173]

We do not wish, however, to have distinct requirements such that the contracting out of the operation of a deferred sharing regime on death would be inconsistent with the present provisions under "The Marital Property Act". Accordingly, in order to ensure an informed and genuine consent by a spouse, we think that a uniform approach should govern the general opting out of the deferred sharing regime both on death and during the spouses' joint lives. Accordingly, we recommend:

[171a] Lethbridge v. Lethbridge (1984), 28 Man. R. (2d) 105 at 108 (Q.B.).

[172] Supra n. 137 at 86 et seq. New Brunswick has also adopted a similar approach. See Marital Property Act, S.N.B. 1980, c. M-1.1, s. 41(b).

[173] Undue influence, duress or the circumstances giving rise to an unconscionable transaction are not always purged by independent legal advice. Ross v. Ross (1984), 26 M.R. (2d) 123 at 138 (C.A.).

> *RECOMMENDATION 37*
>
> *That spouses may release all rights to an allocation of property during the spouses' joint lives or on death by way of a spousal agreement.*
>
> *RECOMMENDATION 38*
>
> *That where a spouse has not, prior to the signing of a spousal agreement, obtained independent legal advice as to the nature of the agreement and its effect on the rights of the spouse under "The Marital Property Act", the court should not give effect to the spousal agreement if at the time it was entered into it was substantially unfair.*

We wish to confirm that spouses who have mutually released or contracted out of their fixed share in accordance with section 23 of "The Dower Act" should have this earlier agreement respected. We think that such an agreement, made before the coming into force of the deferred sharing regime on death, should be given the same weight and consideration as it would have been given had it been considered with respect to the right of the surviving spouse to elect a fixed share. In other words, if the agreement would have barred the surviving spouse from seeking a fixed share, there would be no entitlement to seek an allocation of property on death. Similarly, we are of the view that the same treatment ought to be afforded to a spousal agreement under "The Marital Property Act". Accordingly, we recommend:

RECOMMENDATION 39

That any release of or contracting out of dower rights properly made under section 23 of "The Dower Act" before the coming into force of a deferred sharing regime on death should bar the right to seek an accounting on death.

RECOMMENDATION 40

That any spousal agreement properly made under paragraph 1(1)(f) of "The Marital Property Act" before the coming into force of recommendation 38 should be given the same weight and consideration it would have been given had it been considered in any proceeding before the coming into force of recommendation 38.

U. De Facto Relationships

In this Report we have confined ourselves to those relationships in which the parties are legally married, to the exclusion of de facto relationships.[174] By de facto relationship we mean a man and woman who, although not legally married to each other, live together as husband and wife. The Commission has concluded that there is no demonstrated need to extend the application of the proposed deferred sharing regime on death to de facto relationships.

We believe that it would be highly inappropriate to extend the presumption of equal sharing on death to de facto spouses given that "The Marital Property Act" does not permit an allocation of property during the joint lives of de facto spouses. The Commission concurs with Mr. Justice Dickson's (as he then was) view in Pettkus v. Becker:

> . . . [L]egislation was unnecessary to cover these facts, [ie. de facto spouses] for a remedy was always available in equity for property division between unmarried individuals contributing to the acquisition of assets.[175]

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[174] Nor would a surviving de facto spouse be entitled to a fixed share of the deceased's estate pursuant to section 15 of "The Dower Act".

[175] (1980), 117 D.L.R. (3d) 257 at 276 (S.C.C.).

In our view, the doctrines of resulting and constructive trust provide a de facto spouse with an appropriate equitable remedy in order to seek a share in the deceased's estate.[176] These doctrines permit a much greater scope to the court's discretionary power both as to entitlement and as to quantum.[177] Given that there is an innumerable variety of circumstances and that the nature of these relationships, in terms of the expectations, behaviour and intentions of the partners may vary considerably, we think that the discretionary power has a vital role to play in the just resolution of property issues between de facto spouses. In light of recommendation 12, that there be no discretionary power vested in the court to vary the norm of equal sharing under the proposed deferred sharing regime, we think that it would be improper to subject de facto spouses to this regime.

In addition, to equate the rights of de facto spouses with those of married couples would restrict the freedom of couples who make a conscious decision not to marry precisely because they wish to avoid the legal rights and obligations of married people. Accordingly, we recommend:

RECOMMENDATION 41

That a deferred sharing regime on death should apply only to those persons who are married.

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[176] See, for example, Beauchamp v. Badali Estate (1983), 22 Man. R. (2d) 43 (Q.B.) where despite the court's comment that one might expect that some consideration should be given to recognize a de facto spouse under "The Dower Act", the surviving de facto spouse was awarded the balance of the estate remaining after providing $1,000 to each of the deceased's siblings. The total estate was worth approximately $37,200 and the deceased had split his estate in five equal shares and gave one share to his common law wife and the others to his three sisters and his brother. See also Netzer v. Guy, Saskatchewan Queen's Bench, unreported, January 27, 1983; Pettkus v. Becker, id.; Rathwell v. Rathwell (1978), 83 D.L.R. (3d) 289 (S.C.C.); Smith v. deCarle, (1983), 22 Man. R. (2d) 159 (Q.B.).

[177] The resulting trust is likely to be invoked less frequently in view of the requirement of common intention. The constructive trust is available, however, as a remedial tool in the absence of proof of a common intention. It is available where the facts display an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.

CHAPTER 4

RECOMMENDATIONS REGARDING ANTI-AVOIDANCE PROTECTION

We observed earlier the apparent ease with which the applicability of the fixed share under "The Dower Act" can be avoided by decreasing or eliminating the probate estate through the use of various devices.[178] While this problem is very readily identified, it is not easily remedied. In this Chapter, we focus on the need for and the appropriate restrictions upon the operation of anti-avoidance measures in an allocation of marital property. We begin with an examination of the present anti-avoidance scheme found under "The Marital Property Act" with a view to assessing its adequacy and the feasibility of its operation in an accounting on death. We then consider a large class of dispositions known as will substitutes which are of particular import on death. Our recommendations for reform which follow contemplate a comprehensive anti-avoidance scheme that is designed to operate both in an accounting on death and during the joint lives of the spouses. The balance of the Chapter is devoted to an examination of a specific anti-avoidance device which merits separate consideration, namely, a contract to leave property by will.

A. THE DEFICIENCY

It is generally accepted that the disposal of property before death and the creation of will substitute arrangements pass the property which is the subject matter of the transfer outside the probate or administrative process.[179] Hence, only the property remaining in the hands of the deceased spouse's personal representative after the payment of all debts and charges against the estate is available to satisfy a balancing payment. The object of an anti-avoidance scheme is to provide some measure of economic protection to the surviving spouse where the predeceasing spouse has removed assets from the estate which otherwise would have been shareable in an accounting.

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[178] This deficiency under "The Dower Act" is set forth in Chapter 2. For a thorough and detailed discussion of the anti-avoidance problem, see W.D. Macdonald, Fraud on the Widow's Share (1960).

Property can be put outside the application of a deferred sharing regime in a variety of ways and often with little difficulty. Conceptually, a distinction may be drawn between an absolute inter vivos transfer and a will substitute. An absolute inter vivos transfer is an outright disposition of property by a spouse during his/her life. Property is indefeasibly vested in a third party and no beneficial interest is retained by the spouse. On the other hand, a will substitute is a device short of an outright disposition wherein a substantial degree of control over, or interest in, the property is retained by a spouse during his/her life but the assets do not form part of the deceased spouse's estate at death. For example, in the former category would be an inter vivos gift, in the latter category would be a transfer into a revocable trust in which the spouse retains a power of encroachment.

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[179] Kerslake v. Gray, [1957] S.C.R. 516 held that a dependant may only look to the "estate" which the personal representative of the deceased is entitled to administer. See generally Pope v. Stevens, supra n. 147 at 81; In Re Moreau Estate (1983), 23 Man. R. (2d) 202 (Surr. Ct.); rev'd on another point 26 Man. R. (2d) 40 (C.A.). And see Shinbane v. Minuk, [1927] 2 W.W.R. 121 (Man. C.A.). where the defendant's wife transferred land to the plaintiff upon trust that he should sell it after her death and distribute the proceeds among three named beneficiaries; the transfer was made in order to exclude the husband's interest under "The Dower Act". Trueman J.A. held that the transfer was testamentary and was to have no effect or operation until death. Fullerton J.A. commented at 123:

> The evidence as above set out shows that the transfer in question was made for the express purpose of cutting out the one-third interest of the defendant under "The Dower Act". While it is perfectly true that people may evade an Act of Parliament if they can, I think in this case the proper course was not taken to effect that end.

B. EXPERIENCE ELSEWHERE

In recent years, anti-avoidance protection has been the subject of considerable attention by law reform agencies and legislatures. Before developing our proposals, we looked at how other jurisdictions have addressed problems of the kind we are now considering.[180] Our observation of proposals and recommendations in other jurisdictions has indicated that no one solution is universally accepted. The anti-avoidance schemes which have been adopted are poles apart in substance as well as in form. Some schemes are far-reaching; others are more limited in scope and effect.

Much of the reform has focused on protective measures, not in the area of a marital property allocation, but rather in the related field of dependants' relief. That is, the schemes attempt to provide some protective measures where the deceased has disposed of his/her property to others and has not made adequate provision for specified dependants. The Uniform Law Conference of Canada has enacted an anti-avoidance scheme in its Uniform Dependants' Relief Act which has been adopted, in part, by four Canadian jurisdictions.[181]

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[180] We have been assisted greatly by the following studies: Law Reform Commission of British Columbia, Statutory Succession Rights, Working Paper No. 35, Vancouver (1982) at 185; Institute of Law Research and Reform, Family Relief, Report No. 29, Edmonton (1978) at 110; Law Reform Commission of New South Wales, Report on the Testator's Family Maintenance and Guardianship of Infants Act, 1916, Sydney (1977) at 76; The Law Commission (England), Family Law, Second Report on Family Property: Family Provision on Death, supra n. 72 at 48; American Uniform Probate Code approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association. The pertinent sections of the Code are set forth in Appendix C.

[181] Ontario, Prince Edward Island, The Yukon and Northwest Terriroties have all adopted, at least in part, some of the measures under the Uniform Act. See e.g., Succession Law Reform Act, R.S.O. 1980, c. 488, s. 72; Dependants of a Deceased Person Relief Act, R.S.P.E.I. 1974 c. D-6, s. 19(1) and 20(1). Sections 20 and 21 of the Uniform Dependants' Relief Act are contained in Appendix E to this Report.

We have drawn on an excellent article by Prof. Wilbur Bowker addressing this subject matter which was made available to the Uniform Law Conference of Canada. See 1970 Proceedings of the Fifty-second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada at p. 126

In the field of marital property legislation, Saskatchewan is the only jurisdiction with anti-avoidance provisions which are operative in an accounting on death.[182]

C. ANTI-AVOIDANCE PROTECTION ON DEATH - THE CASE IN PRINCIPLE

As we mentioned earlier, "The Marital Property Act" already contains some anti-avoidance provisions respecting outright inter vivos transfers.[183] These were designed to ensure that one spouse could not deprive the other of a right to an equal share in the total of potentially divisible assets. These measures, of course, would only be applicable where a spouse has disposed of an asset that otherwise would have been shareable. In an allocation of property on death, can it be said that like rules are wrong? We think not. It would be anomalous if a spouse were allowed to defeat an accounting on death but not an allocation during the spouses' joint lives.

The proposed deferred sharing regime on death will be effective only to the extent that there is an estate out of which a balancing claim may be granted. In order to provide consistent treatment to a spouse in a pre- and post-death allocation of marital property, we believe that anti-avoidance measures are required for the deferred sharing regime on death. We acknowledge that the number of Canadian cases on evasion is not large and it may fairly be said that any mischief is not widespread.[184] While on the whole the majority of spouses will not attempt to defeat an allocation of property on death, there remains the possibility that some may put shareable assets beyond the reach of the surviving spouse. Despite the fact that this conduct may be rare, we think it important to ensure effective protection against attempted evasions in an accounting on death. In our view such measures will have a substantive effect by providing the court with power to review certain transactions, as well as a deterrent effect by discouraging spouses from arranging their affairs so as to defeat justifiable claims.

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[182] The Matrimonial Property Act, S.S. 1979, c. M-6.1, s. 28(1) et seq.

[183] These provisions were not drafted with the intent that they would ordinarily be invoked on death and it would appear that they would not embrace will substitutes.

[184] In Appendix D, we summarize most of the reported Canadian caselaw with a view to illustrating the types of dispositions or devices employed which evade an application under dependants' relief legislation.

The American experience, however, has been distinct; the caselaw has been extensive and almost every conceivable device has been employed to reduce the survivor's statutory share. Some of the American courts have set aside the predeceasing spouse's otherwise valid transfers to the extent necessary to satisfy the spouse's elective share if the transfers were, by various tests, "colorable", "illusory" or "in fraud of" or made with the "intent to defeat" the spouse's statutory share. See, W.D. MacDonald, supra n. 178 at 67, 98 and 120.

The Commission does not, however, favour the adoption of separate anti-avoidance measures on death such that the rules on death would be different from those operative on marriage breakdown. What we envisage is a comprehensive, uniform anti-avoidance scheme which would operate in an accounting on death as well as in an accounting during the spouses' joint lives.

We have identified three fundamental and conflicting interests which must be recognized and reconciled in determining an appropriate anti-avoidance scheme. First, there is the interest in protecting the surviving spouse from transactions which have the effect of depriving him/her of a balancing claim. Second, there is the interest in permitting as wide a scope as possible to freedom of alienation and freedom of testation. The predeceasing spouse will undoubtedly have some wish to dispose of property and to arrange his/her affairs. A spouse should be able to predict with some degree of certainty the consequences of his/her actions in relation to dispositions of property and in relation to his/her spouse. Finally, care must be taken to maintain the maximum security of title in order to protect the interest of third parties. We have attempted to weigh and to consider each of these interests in order to achieve a satisfactory reconciliation among them.

In formulating our recommendations for reform, we have also borne in mind the need to devise a practicable method of avoiding the effect of dispositions which defeat an accounting without creating as many anomalies and injustices as are remedied. Our aim is to ensure that the measures proposed under an anti-avoidance scheme will provide a just and workable legislative solution.

D. PRESENT LEGISLATIVE FRAMEWORK - AN OVERVIEW

Subsections 6(7) to 6(11) of "The Marital Property Act" of Manitoba set forth anti-avoidance provisions which may be invoked in an accounting of property during the spouses' joint lives.[185] They provide as follows:

> Dissipation of asset
>
> 6(7) Where
>
> (a) a spouse, before or after the coming into force of this Act but after May 6, 1977, dissipates an asset in whole or in part; and
>
> (b) the other spouse, before the expiry of 2 years from the date of the dissipation referred to in clause (a) or from the date of the discovery thereof, applies to a court under Part III for an accounting and division of assets;
>
> the value of the dissipated asset or the dissipated portion thereof, as the case may be, shall be added to the inventory of assets of the spouse in the accounting.
>
> Excessive gift
>
> 6(8) Where
>
> (a) a spouse, before or after the coming into force of this Act but after May 6, 1977, transfers an asset to a 3rd person by way of gift, and the gift is excessive in whole or in part; and
> (b) the other spouse, before the expiry of 2 years from the date of the transfer referred to a clause (a) or from the date of the discovery thereof, applies to a court under Part III for an accounting and division of assets;
>
> the value of the asset or the excessive portion thereof, as the case may be, shall be added to the inventory of assets of the spouse in the accounting.

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[185] These sections have not yet had the benefit of extensive judicial interpretation. They were considered generally in the case of Lewyc v. Lewyc, Man. Q.B. unreported, May 4, 1984, Carr J.

Transfer for inadequate consideration

6(9) Where

(a) a spouse, before or after the coming into force of this Act but after May 6, 1977, transfers an asset to a 3rd person for inadequate consideration;

(b) the transfer referred to in clause (a) is effected by the spouse with the intention of defeating the rights of the other spouse under this Act; and

(c) the other spouse, before the expiry of 2 years from the date of the transfer referred to in clause (a) or from the date of the discovery thereof, applies to a court under Part III for an accounting and division of assets;

the amount of the inadequacy in the consideration shall be added to the inventory of assets of the spouse in the accounting.

Recovery from recipient

6(10) In the circumstances described in subsection (8) or (9), where the spouse effecting the transfer is unable to satisfy any amount payable to the other spouse upon a division of assets under Part II, recovery of the value of the excessive gift or excessive portion of the gift or of the amount of the inadequacy in consideration, up to the total of the unsatisfied amount or unsatisfied portion of the amount payable upon the division, may be made from the transferee of the asset by application to a court under Part III.

Application of subsec. (10)

6(11) In the circumstances described in subsection (9), subsection (10) does not apply if the court is satisfied that the transferee acted bona fide and without knowledge that the transfer was effected with the intention described in clause (9)(b).

This anti-avoidance scheme in effect contemplates a two-step process. First, there is the inclusion of the dissipated asset or the transferred property in the inventory of the spouse making the disposition so that in determining the balancing claim (s)he will bear the burden of accounting for it. Second, a limited form of recovery from a third party recipient is permitted provided certain conditions are first satisfied.

Three broad types of transactions are included in the inventory of shareable gains of the spouse effecting the transaction, namely the dissipation of an asset, an excessive gift and a transfer for inadequate consideration. Simply stated, where a spouse does any act which jeopardizes the financial security of the household by the gross and irresponsible squandering of an asset, i.e. dissipation, the value of that asset is included in the spouse's inventory.[186] Similarly, where a spouse makes an excessive gift to a third party, the excessive portion of the gift is added to the inventory of assets. An excessive gift differs from a transfer for inadequate consideration in one very important respect. With respect to the latter, an intention to defeat the other spouse's rights under the Act must first be established in order to include the amount of the inadequacy in the consideration in the spouse's shareable gains. By including these amounts in the respective spouse's inventory, the depletion of the net estate which would otherwise have occurred is prevented.

In addition, this scheme permits a limited form of recovery from a third party who has benefitted from an excessive gift or transfer for inadequate consideration. The third party may be afforded a measure of protection in two ways. First, the right to claim contribution from the transferee or donee only arises where the spouse effecting the transfer is unable to satisfy any amount payable to the other spouse on a division of assets. Second, in order to seek recovery from a transferee respecting transfers for inadequate consideration, the transferee must have had knowledge of the spouse's attempt to defeat the rights of the other spouse and must have failed to act bona fide.[187]

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[186] "The Marital Property Act, C.C.S.M. c. M45, s. 1(1)(c).

[187] From the language of the statute, it would not appear that any form of direct or indirect participation in the avoidance scheme is required by the third party.

while an innocent purchaser may not be called upon to contribute, the good faith of the donee of an excessive gift is immaterial; if the transfer is not supported by consideration, the complainant spouse need prove only that the gift is excessive.

E. AN ANALYSIS OF THE ANTI-AVOIDANCE MEASURES

Having briefly set forth an overview of the anti-avoidance provisions under "The Marital Property Act", we turn now to consider those issues and concerns that we think should be addressed in proposing or implementing any change to an anti-avoidance scheme. In doing so, we attempt to set forth the reasons why we have sought to depart from some of the principles under the present scheme.

We first assess how to account for the dissipation of an asset by a spouse in an allocation of property on death. The criteria which govern the inclusion of a transferred asset in the appropriate spouse's inventory of property are then explored. In particular, we explore the role of intention on the part of the spouse disposing of the property. Finally, we consider when and how to effect specific recovery from third parties who are the recipients of the transferred property.

It should be borne in mind throughout that the anti-avoidance measures which we propose are simply intended to apply to those property acquisitions which otherwise would have been shareable and considered as part of the spouse's inventory of property. For example, a transfer made before marriage would not be included.

1. Inclusion of Asset in Spouse's Inventory of Property

(a) Dissipation of an asset

Subsection 6(7) of "The Marital Property Act" causes a spouse to include in his/her shareable gains the deliberate wasting of an asset.[188] It is directed at an intentional or frivolous dissipation of an asset by a spendthrift as opposed to the simple bad management of an asset on the part of a spouse. We think that the former conduct should be recognized in an accounting on death. In so doing, both the predeceasing spouse and the surviving spouse who carelessly or deliberately dissipates an asset with complete indifference as to the consequences may be called upon to include the value of the dissipated asset in his/her inventory of property.[189] Accordingly, we recommend:

RECOMMENDATION 42

That for purposes of an accounting on death and during the spouses' joint lives, where a spouse dissipates an asset, the value of the dissipated asset should be added to that spouse's inventory of property.

(b) Excessive gift v. transfer for inadequate consideration

Under the present scheme an excessive gift and a transfer for inadequate consideration are treated differently for purposes of determining their inclusion in the appropriate spouse's inventory of shareable gains. The inclusion of a transfer for inadequate consideration turns upon the subjective intention of the spouse disposing of the property; namely, did the spouse intend to defeat the rights of the other spouse under the Act in making the transfer? On the other hand, the inclusion of an excessive gift is based upon things external to the mind of the spouse disposing of the property; if a given disposition of property is characterized as an excessive gift, it must be accounted for.

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[188] The other spouse must, however, apply for an accounting within two years from the date of the dissipation or the discovery thereof. We explore this time frame in greater detail at page 133 and recommend that it be maintained. In addition, in accord with the cut-off date under "The Marital Property Act", only those assets dissipated after May 6, 1977 would be accounted for.

[189] Once the value of the dissipated asset is included in the appropriate spouse's inventory, the extent of each spouse's property accumulations and debts will determine whether or not a balancing claim is payable to the complainant spouse.

The Commission considered what role, if any, the intention of a spouse disposing of property should play in an anti-avoidance scheme. In particular, we examined whether it would be impractical to base the operation of an anti-avoidance provision on the intent of a spouse who may be dead.

To ascertain the subjective intention of a spouse disposing of property may pose some troublesome problems. For example, it may be difficult to state this test with precision. Would the intention have to have a substantial influence on the decision to transfer the property or on the terms of the disposition; would the intention have to be the sole intention, and if not, would it have to be the dominant intention? As well, there may be some problems faced in proving the real intentions and motives of a spouse, particularly where concealment and subterfuge may be used to camouflage the purpose of the transaction. This difficulty may be magnified in the case of an allocation of property on death since the person who knows most about his/her intention is dead. The necessary evidence might be difficult to obtain.

Yet, lack of evidence is a hazard in all litigation and an accounting on death is, in this sense, no different from other civil proceedings. More importantly, judges are accustomed to having regard to all the surrounding circumstances from which presumptions may be raised and inferences reasonably drawn as to the intent of a person.[190] We note that both the anti-avoidance schemes of England and New South Wales which operate on death are predicated, in part, upon an intention to defeat an application for family relief.[191] We do not think that a provision requiring proof of a spouse's intention would be inherently unworkable either in an accounting during the spouses' joint lives or on death. But, would it be fair? For purposes of including the transferred asset in the inventory of shareable gains, we think not.

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[190] We note that a somewhat different though related test is prescribed under "The Fraudulent Conveyances Act", C.C.S.M. c. F160, s. 3, which raises some analogous considerations. It would appear that the courts have been willing to raise presumptions and draw inferences of fraudulent intent from all the surrounding circumstances.

In our view, irrespective of the spouse's intent, both an excessive gift and a transfer for inadequate consideration should be considered as part of the spouse's estate in order to determine the quantum of the balancing claim. However, for purposes of effecting recovery from a third party who has benefitted from such transfers, we think that an intent to evade the policy of the Act must be present. We now set forth our reasons for proposing this compromise.

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[191] The Inheritance (Provision for Family and Dependants) Act 1975, c. 63, s. 10(2) gives the court a broad discretionary power to review transfers made, otherwise than for a full and valuable consideration, and effected by the deceased, within 6 years prior to death with the intention of defeating claims under the Act. Property comprised in these transactions may be available for family provision where the court is satisfied that the exercise of the power conferred would facilitate the making of financial provision.

The measures under the New South Wales Testator's Family Maintenance and Guardianship of Infants (Family Provision) Amendment Bill 1982, stem from a report of its Law Reform Commission, supra n. 180. Broadly stated, the Bill provides that property which the deceased has disposed of within 3 years before death wholly or partly by way of gift and with the intention of evading the Act, is capable of being made the subject of an order under the Act.

We mention these two provisions, not for the purpose of a detailed comparison with our proposals, but simply to illustrate that two anti-avoidance schemes based upon the intent of a spouse have been adopted fairly recently.

Simply stated, we think that subsection 6(9) which considers a transfer for inadequate consideration could be mischievous if left in its present form. The scheme appears to permit a spouse to masquerade a gift by casting it in the form of a transfer for inadequate consideration. For example, the inclusion in the spouse's inventory of a transfer of a valuable art collection valued at some $5,000 made in return for $100 is contingent upon proof of an intention to defeat the policy of the Act. The Commission is concerned that a spouse may frame the transfer to contemplate some form of nominal consideration in order to invoke the more stringent requirement of intent, and thereby defeat or prejudice the balancing claim of the other spouse. It is the Commission's view that to the extent a transfer is not for a full and adequate consideration, it contains an element of gift and should therefore be afforded like treatment.

For purposes of including the transferred asset in the spouse's shareable gains, we do not favour a test or approach which is predicated upon the intention of the spouse in making the disposition. Whether it be an excessive gift or transfer for inadequate consideration, the effect of the transfer and the depletion on the estate is the same whether the spouse is prompted by benevolence towards the third party or, alternatively, deliberately frames a collusive transfer with the intent of defeating an accounting.

C. Unreasonably Large Dispositions

Having determined that for purposes of including the transferred asset the distinction between an excessive gift and a transfer for inadequate consideration should be removed, we see no reason to continue the language employed under "The Marital Property Act". We prefer the terminology embodied by the Uniform Law Conference of Canada in the Uniform Dependants' Relief Act. Under that Act, all transfers, be they outright gifts or transfers for inadequate consideration which can be defined as "unreasonably large dispositions", may be investigated by the court.[192] A similar approach was also proposed by the Alberta Institute of Law Research and Reform within the framework of its dependants' relief legislation.[193] It is the Commission's view that where a transfer may be characterized as an unreasonably large disposition, whatever the intention was that led to the transfer, its value should be added to the appropriate spouse's inventory.

We acknowledge that what constitutes an unreasonably large disposition may pose some difficult definitional problems.[194] To assist the court in determining whether a disposition is unreasonably large and to provide greater certainty of its ambit, we propose the adoption of the following criteria, most of which are drawn from the Uniform Dependants Relief Act, namely:

(a) the ratio of the value of the property disposed of to the value of the property retained at the time of the transfer;

(b) the aggregate value of all property disposed of under prior and simultaneous dispositions, whether those dispositions were made prior to or subsequent to the cut-off period;[195]

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[192] Sections 20 and 21 of the Uniform Dependants' Relief Act are set forth in Appendix E. Section 21 of the Uniform Act does not, however, include the value of an unreasonably large disposition into the deceased's estate. Rather, section 21 of the Uniform Dependants' Relief Act simply empowers the court to impose upon the transferee of an unreasonably large disposition, a personal obligation to provide support for dependants, where there are insufficient assets in the net estate out of which to provide adequate maintenance. This secton is based primarily on the draft Act proposed by W.D. Macdonald, in his book, Fraud on the Widow's Share, supra n. 178.

[193] The Institute of Law Research and Reform, Family Relief Report, supra n. 180 at 121. We have benefitted much in considering the proposals of the Alberta Institute.

[194] Similarly, the ambit of the term "excessive gift" under the present legislation would be the subject matter of some conjecture and speculation.

(c) any moral or legal obligation of the spouse to make the disposition;

(d) the amount in money or money's worth of any consideration paid by the person to whom the property was disposed;

(e) any other circumstance that the court considers relevant.

The purpose of paragraph (a) would be to ensure that the size of the transfer in relation to the balance of the spouse's property retained would be tested by reference to circumstances prevailing at the time of the transfer. Provided that the transfer was reasonable at the time it was made, there should be no inclusion of the disposition even though the spouse's wealth might have diminished subsequently. Paragraph (b) would prevent the evasion of an accounting of marital property by a large number of moderate gifts to one or a number of transferees not one of which is by itself unreasonably large but which in the aggregate may be decidedly unreasonable.[196] In determining the reasonableness of a particular transfer, the court could also consider other property or wealth excluded by virtue of the cut-off period. The purpose of paragraph (c) would be to recognize a spouse's moral or legal obligation to a transferee as a factor affecting the reasonableness of the transfer. Paragraph (d) would direct an examination as to whether the consideration, if any, given for the property conveyed was fair and reasonable relative to the value of such property.[197] Finally, in deciding whether a particular transfer may be characterized as an unreasonably large disposition, all relevant circumstances would be considered.

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[195] By cut-off period we mean the period of time after which a specific transfer would be immune from review. At p. 133 we examine in detail what would be an appropriate cut-off period.

[196] Under the Uniform Probate Code, the predeceasing spouse must account for all transfers made within two years of the death of the spouse in excess of $3,000 to any one donee. If the spouse gives away $12,000 to four people ($3,000 per person), none of the gifts is included in the augmented estate. The potential for disinheritance appears to be limited only by the number of potential donees. Paragraph (b) is designed to avoid this result.

[197] Only to the extent that a transfer is gratuitous will the transfer remove value from the spouse's estate. If the transfer is for consideration, to the extent that the consideration is paid to the estate and reflects the fair value of the property, no value is removed from the spouse's estate. Only the character of the property changes.

Before leaving the issue of unreasonably large dispositions, it bears noting that we are not attempting to impinge on or catch regular business transfers. Ordinarily, the consideration offered for property transferred in the normal course of business will bear a fair and reasonable value relative to the property conveyed. Where there has been some inequality in the consideration for the contract, we think that the court in considering all of the relevant facts and circumstances, would not include a bad business bargain within the ambit of an unreasonably large disposition. For greater certainty, however, we are of the view that a genuine business transaction should be specifically excluded from the ambit of an unreasonably large disposition.

We now summarize our views. The inclusion of an unreasonably large disposition, whatever the intention was that led to its transfer, should mean that the other spouse will not suffer the depletion of the balancing claim which might otherwise have occurred. Bearing in mind the powerful human instinct against irrevocably parting with all of one's property, we think that in most instances there would be sufficient assets remaining in the spouse's inventory to satisfy the balancing claim. Where there is a deficiency, we later set forth our proposals respecting recovery from the third party in whose favour the spouse has made the unreasonably large disposition. Accordingly, we recommend:

RECOMMENDATION 43

That subsections 6(8) and (9) of "The Marital Property Act" be repealed and the following substituted therefor:

That in both an accounting on death and during the spouses' joint lives, where a spouse makes an unreasonably large disposition of real or personal property, not including a genuine business transaction,

(a) as a transfer by gift inter vivos, whether by deed, delivery or declaration of irrevocable trust or

(b) as a transfer for inadequate consideration,

the value of the amount by which the court considers the disposition to have been unreasonably large as at the date of the transfer, should be added to the inventory of the spouse making the transfer.

RECOMMENDATION 44

That in determining whether a disposition of property is a disposition of an unreasonably large amount of property, the court should consider:

(a) the ratio of the value of the property disposed of to the value of the property retained at the time of the transfer;

(b) the aggregate value of all property disposed of under prior and simultaneous dispositions, whether those dispositions were made prior to or subsequent to the cut-off period;

(c) any moral or legal obligation of the spouse to make the disposition;

(d) the amount in money or money's worth of any consideration paid by the person to whom the property was disposed;

(e) any other circumstance that the court considers relevant.

2. Recovery from Third Parties

Once the value of the unreasonably large disposition has been included in the appropriate spouse's inventory, the extent of each spouse's property accumulations and debts will determine whether or not a balancing claim is payable to the complainant spouse. Having set forth the criteria to determine the inclusion of unreasonably large dispositions in the appropriate spouse's inventory, we turn now to investigate how to effect specific recovery from third parties where a balancing claim is payable in favour of the surviving spouse. Without a doubt this is the most difficult and controversial issue in respect of the operation of an anti-avoidance scheme.

Any provision for setting aside or for the recovery of the value of what would otherwise be a valid disposition of property is a substantial step to take. The very real risk in doing so is that a third party may be injuriously affected not merely by being deprived of the gift or the value of the benefit but as a result of changing his/her position to his/her detriment in reliance upon a sound title. Hence, we believe that anti-avoidance measures should be closely confined so far as recovery from third parties is permitted.

Under the present scheme, it will be recalled that there are two safeguards limiting recovery from a third party who has been the recipient of the transferred property. First, the right to claim contribution from a third party only arises where there are insufficient other assets in the net estate out of which to permit a balancing claim. Second, recovery from a transferee respecting transfers for inadequate consideration is predicated upon the third party's knowledge of the spouse's intent to evade the policy of the Act. On the other hand, it would appear that the donee of an excessive gift may be called upon to meet the deficiency in a balancing claim in the absence of any attempt on the part of a spouse to reduce a likely balancing claim and in the absence of the third party's knowledge of such an intent.

The Commission's concern with the present scheme is that in our view it does not properly recognize the reliance interest of donees in whom a property interest has vested. By reliance interest we mean the natural tendency of a third party, whether a donee or transferee, to depend upon the economic or other advantage occasioned as a result of the property transferred.[198]

As a general proposition, we do not favour automatic recovery where the property is owned by an innocent donee who has no notice of the spouse's improper intent in making the transfer. In order to minimize the possible harm which may accrue to third parties, we think that the donee's reliance interest should be afforded the same protection that is acknowledged for a transferee. Recovery should be predicated upon the third party's notice of an intent on the part of the spouse to defeat the rights of the other spouse in an accounting of assets.

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[198] In Fraud on The Widow's Share, Macdonald points out that the greater the dependence by the donee the greater the injury when he is suddenly bereft of the benefit. It may fairly be stated that the longer the time lapse between the date of the transfer and the date on which the donee is called upon to contribute, the greater the infringement on the donee's legitimate reliance interest. Supra n. 178 at 42.

As we observed earlier, an inquiry directed at the intent of a spouse in making a transfer is not, in our opinion, inherently unworkable. The inquiry ought to be whether the spouse made an unreasonably large disposition with the intent of removing property from the spouse's shareable gains in order to defeat or reduce a likely balancing claim. Such an intent would be ascertained through an examination of all the facts and circumstances surrounding the transfer. Where direct evidence of intent is not available, we think the need to prove a subjective intent may be satisfied by the marshalling of objective facts. The American case law has delineated at least six pertinent areas of inquiry to be considered in determining the spouse's intent, namely:

(a) the existence of any consideration supporting the transfer;

(b) the size of the transfer in relation to the spouse's assets;

(c) the time between the transfer and the spouse's death (applicable in an accounting on death);

(d) the nature of the relationship between the spouses;

(e) the relationship, if any, between the spouse and the person who benefitted; and

(f) the secretive nature of the transfer or manner in which the spouse acted.[199]

We think that this required intent should be satisfied where the court is of the opinion that, on the balance of probabilities, the intention of the spouse, though not necessarily the sole intention in making the disposition, was to remove property from his/her shareable estate in order to defeat or diminish a balancing claim. By investigating fully the circumstances and merits of each case before claiming contribution from a third party, we believe that a more just and socially desirable result would be produced.[200]

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[199] See, for example, Rose v. St.Louis Union Trust Company (1969), 253 N.E. 2d 417. Several American statutes in operation today use the intent to disinherit test. See Tenn. Code Ann. s. 31-105 (Cum. Supp. 1982) ("with an intent to defeat the surviving spouse of his distributive or elective share"); Wisc. Stat. Ann. s. 861.05 (West Supp. 1977) ("any property arrangement made by the decedent in fraud of the spouse's rights to an elective share").

Our proposal requires the complainant spouse, seeking recovery from the third party who benefitted, to prove both an intent on the part of the transferor spouse to remove property from his/her estate and the third party's notice of such an intent. Notice, in our view, should also include constructive notice. Constructive notice may be found where the circumstances surrounding the transaction should have led the transferee to enquire as to the bona fides of the transaction or the intention of the spouse. We do not think that any form of collusion or assistance with the deliberate object of helping the spouse to carry out an improper intent need be established. In our opinion, simple notice of a spouse's improper intent should suffice.

We do not favour any provision which would automatically set aside or recapture the actual disposition of property. Such a scheme would be fraught with the difficulty of tracing property which has passed into the hands of third and fourth parties. Moreover, by recognizing a potential interest in the property in question, its alienability might be restricted which may thereby adversely affect its utility and value. Rather, we envisage a similar provision to that in subsection 6(10) of "The Marital Property Act", the object of which would be to require the third party, who has benefitted from an unreasonably large transfer, to contribute to the balancing claim.[201] Where there are insufficient assets to satisfy the balancing claim, we think that this approach would serve to enhance the social interest in security of title.

In our estimation, the extent of the transferee's liability to contribute should be governed by two further factors. First, the person who has benefitted should be liable to contribute no more than the extent to which the disposition was unreasonably large at the time of the transfer. In this way, the transferee is protected in the event that the property has increased in value. Second, where the property has depreciated substantially since the date of the original transfer by the spouse, we think that the third party who has benefitted should not be liable to contribute more than the fair market value of the property at the date of an application to seek an accounting. The right to seek contribution from the third party who has benefitted should remain, in our view, whether or not the person is still the owner of the property disposed of in his/her favour by the spouse.[202]

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[200] It should be remembered, however, that the inclusion of an unreasonably large disposition in the appropriate spouse's inventory for the purpose of determining the quantum of the balancing claim is not predicated upon an evasive intent.

[201] Where the unreasonably large disposition is effected by way of an irrevocable transfer to a trustee who is to hold the property for the intended trust beneficiary, recovery should be sought from the beneficiary of such a trust, not the trustee who simply holds and administers the property on behalf of the beneficiary.

Where the deceased has made several dispositions of property that were unreasonably large, it is our view that no person to whom property was disposed of should be called upon to contribute more than his/her *pro rata* share based on the extent to which the disposition was unreasonably large. Consider the following example: suppose that the spouse transferred $20,000 to A and purchased a new car for B valued at $15,000. Assume also that $9,000 is needed to satisfy the balancing claim and that at the time of the application the car has since depreciated to $10,000. The maximum contribution for each transferee should be his *pro rata* share, that is, A's contribution would be $6,000 and B's contribution would be $3,000 in order to satisfy the deficiency.[203]

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[202] We have departed from the approach under the *Uniform Dependants Relief Act* which restricts recovery to the combined value of any remaining original property and any remaining proceeds or substituted property where the person to whom property was disposed of has subsequently transferred or exchanged the property. Should the transeree make a gift of his entire beneficial interest in the subject matter of the transfer, it appears that there would no longer be any liability for contribution under the Uniform Act.

[203] This *pro rata* sharing would be determined as follows:

$$\frac{\$20,000}{\$30,000} \times \$9000 = \$6,000$$

$$\frac{\$10,000}{\$30,000} \times \$9000 = \$3,000$$

As we see it, the court would not be called upon often to exercise its jurisdiction under these proposals. Most spouses will be hesitant to dispose of all their property without limit for fear that they may then be left destitute. Other assets will likely remain in order to satisfy the balancing claim. For purposes of an accounting on death, where the estate assets are sufficient to satisfy the balancing claim, in accordance with recommendation 22, the beneficiaries under the will would bear the burden of the balancing claim in proportion to the value of their respective interests in the estate. Where there is a deficiency, however, an examination of the circumstances surrounding the transfer should ensure that contribution from a third party is not sought without a systematic inquiry into the intent behind a particular transfer. Accordingly, we recommend:

RECOMMENDATION 45

That subsections 6(10) and (11) of "The Marital Property Act" be repealed and the following substituted therefor:

That subject to the exception in recommendation 48, where a spouse effecting an unreasonably large disposition is unable to satisfy any amount payable to the other spouse in an accounting of assets either during the spouses' joint lives or on death, recovery of the value of the amount by which the court considers the transfer to have been unreasonably large, up to the total of the unsatisfied portion, may be made from the transferee for the benefit of whom the disposition was made, whether or not the transferee still holds any interest in the property disposed of to him/her.

RECOMMENDATION 46

That for purposes of recommendation 45, the property which is the subject matter of the transfer should be valued at its fair market value as at the date the transferee becomes beneficially entitled to the property or the date of the application to seek an accounting, whichever amount is lower.

RECOMMENDATION 47

That where the spouse has made several dispositions of property that were unreasonably large, no person to whom property was disposed of should be ordered to pay more than his/her pro rata share based on the extent to which the disposition was unreasonably large.

RECOMMENDATION 48

That a transferee for the benefit of whom the disposition was made, acting in good faith and without actual or constructive notice that the intention of the spouse in making the unreasonably large disposition was to prevent or reduce the amount of a balancing claim, should not be liable to contribute to the payment of a balancing claim.

RECOMMENDATION 49

That for purposes of recommendation 48, the requisite intent on the part of a spouse should be satisfied where the court is of the opinion that, on a balance of probabilities, the intention of the spouse, though not necessarily the sole or dominant intention, in making the disposition was to remove property from his/her estate in order to prevent or reduce the amount of a balancing claim.

Before leaving the matter of unreasonably large dispositions, we wish to confirm that it is not intended that our proposals should cast any new duty upon the deceased spouse's personal representative. The personal representative should not be charged with the responsibility of searching out and reviewing all of the spouse's inter vivos dispositions with a view to ascertaining whether or not any of the transfers were unreasonably large in order to list them in the deceased spouse's inventory. In our view, the onus should be on the surviving spouse who seeks an allocation of property on death to investigate a particular disposition and, where it is unreasonably large, to call for its inclusion in the predeceasing spouse's inventory.

3. Cut-off Period

It remains to consider the appropriate period of time after which a specific transfer would be immune from review. The present time frame under "The Marital Property Act" requires a spouse to bring an application for an accounting within two years from the date of the transfer or the alleged dissipation or from the discovery thereof. A transfer or dissipation occurring prior to the two year cut-off period and of which the other spouse has knowledge would be excluded from an accounting if no application were made within that two year time frame.

The selection of an appropriate cut-off period is to a certain extent rather arbitrary. The various anti-avoidance schemes which operate on death have fixed cut-off periods which vary in length from one year to six years prior to death.[204] The great virtue of the fixed cut-off period is that it provides the third party with the certainty that he will be able to enjoy the full benefit conferred upon him after the lapse of a determined period of time.

However, it is our view that a fixed cut-off period would operate unfairly where the other spouse had no knowledge of the transfer prior to the lapse of the fixed period. We generally favour the retention of the present limitation period which contemplates knowledge of the transfer on the part of the other spouse before the two year period commences. Otherwise, we think that the effectiveness of the anti-avoidance scheme could be severely limited where a spouse deliberately conceals the transfer from his/her spouse.

Of course, for purposes of an accounting on death, the general limitation period must also be observed. That is to say, the application should be commenced within six months from the grant of probate of the will or issuance of the letters of administration. We think that in most instances the surviving spouse will discover that his/her spouse has transferred property inter vivos prior to the lapse of the general limitation period. The exchange of each spouse's inventory of property should permit this disclosure. When the asset transferred is real or personal property which the survivor knew had been acquired or owned by his/her spouse, its exclusion from the predeceasing spouse's inventory will likely be questioned and investigated. In short, in an allocation of property on death, as a matter of practice, this two-year cut-off period from the date of the transfer or discovery thereof is shortened to six months from the grant of probate or issuance of the letters of administration. Where the spouse knew of the transfer or dissipation prior to the death of a spouse and commences an application for an accounting on death within the general limitation period, the transfer/dissipation may still be considered as part of the spouse's estate, provided that two years have not lapsed since discovery thereof. Accordingly, we recommend:

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[204] Inheritance (Provision for Family and Dependants) Act 1975, c. 63 s. 10(2) - (six years); Uniform Dependants' Relief Act, s. 21 - (one year); The Alberta Institute of Law Research and Reform recommended a time limit of three years, supra n. 180 at 119.

> *RECOMMENDATION 50*
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> *That subject to recommendation 31, in order to cause the inclusion of a dissipated asset or an unreasonably large disposition in the appropriate spouse's inventory, the spouse must apply to the court for an accounting before the expiry of two years from the date of the dissipation or from the date of the unreasonably large disposition or from the date of discovery thereof.*

4. WILL SUBSTITUTES

We turn now to examine another large class of dispositions which are of particular import on death. These may be termed will substitutes or incomplete dispositions in that the spouse retains continued benefits or control over the property until death but the property does not form part of the deceased's estate at death. Will substitutes, in effect, permit a spouse to mask the effective retention of ownership in property which has been conveyed in form alone.

Each will substitute differs in function and social utility and poses its own means of control for the spouse. The types of transfers may be arranged on a continuum, depending on the degree of control or the extent of the interest retained by the spouse. At the one end of the continuum, the closest to the absolute transfer category is an irrevocable trust in which the spouse retains a defined and limited interest, for example, the right to income for life. Progressing across the continuum toward the category of an illusory transfer there is, for example, a revocable trust where the spouse retains the power to encroach on the capital.

The following list describes a number of will substitute devices and the manner in which control may be retained.

(a) a gift mortis causa	This is a gift of personalty made in apprehension of imminent death and with the intent that it shall take effect only in the case of the death of the spouse. If the spouse should survive, it must be returned, or should the spouse repent of having made the gift, it may be revoked. This form of will substitute permits the wholesale unloading of the estate when death is known to be imminent.
(b) a joint bank account	Under this arrangement a spouse may, at any time before death, reduce the asset to his or her own exclusive ownership. Yet on the death of the spouse, the right to the whole balance of the account accrues to the survivor.
(c) life insurance, pension schemes	A spouse might revoke or alter the beneficiary under these schemes from his/her spouse or estate to a third party. The savings that are accrued during marriage could thereby be transformed from a potentially shareable asset into cash in the hands of a stranger.
(d) a self-declaration of trust or transfer where the spouse retains the power to revoke the disposition or to encroach upon capital	A spouse who has reserved a power of revocation has an interest which is in effect equivalent to ownership. Similarly, the power to consume or dispose of the principal provides almost as much enjoyment of and control over the property.
(e) joint tenancy in realty	This method of inter vivos disposition of wealth resembles the revocable trust, since the spouse retains virtually full unimpaired incidents of ownership. By operation of law, however, the surviving joint tenant becomes the absolute owner upon the death of the spouse.

(f) a transfer of property where the spouse retains the possession of or enjoyment of or right to income from the property	A spouse whose life expectancy is short may transfer the whole of his/her estate to a trustee, reserving only a life estate with the remainder passing to a named third party.

Where the surviving spouse is the designated beneficiary or recipient of a will substitute, (s)he would be required to make a full accounting of these benefits in accordance with our earlier proposals in recommendation 5. The Commission's concern is now directed at those instances where the predeceasing spouse has named a third party, other than a spouse, to be the recipient of such will substitutes and has effectively removed the assets from his/her shareable estate.

The ease with which these will substitute devices may be employed bears noting. It is true that the natural reluctance to surrender title beyond recall is a most significant deterrent to reducing an estate via outright transfers. However, under a will substitute arrangement where the spouse is able to retain the effective ownership of and enjoyment from the property, (s)he need not contend with the fear of becoming destitute. Where these benefits are substantial and form a major part of the property which passes in consequence of the death of the spouse concerned, their use is capable of causing a hardship on the survivor.[205]

A large step towards more effective protection for the surviving spouse was taken by the National Conference of Commissioners on Uniform State Laws in 1969 when it approved the Uniform Probate Code. The Uniform Probate Code under the concept of the augmented estate brings back into the deceased spouse's estate, for the purpose of determining the surviving spouse's elective share, a number of readily employed will substitutes arrangements.[206] As well, both the Uniform Dependants' Relief Act and the Ontario Succession Law Reform Act deem various forms of will substitutes to be testamentary dispositions and include their capital value in the net estate of the deceased with the intent of making the property which is the subject matter of these transactions available for an order of support for a dependant.[207] We believe that something comparable is essential in an accounting on death.

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[205] We have observed that virtually all but one of the Canadian cases on attempted evasions have dealt with will substitute arrangements. See Appendix D.

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[206] An expressed object of the augmented estate provisions is to prevent a spouse from making arrangements, which transmit property to others by means other than probate, deliberately to defeat the right of the surviving spouse to a share of the deceased spouse's estate. In Appendix C, we set forth the will substitutes which are considered as part of the deceased spouse's augmented estate.

[207] These sections of the Uniform Dependants Relief Act are set forth in Appendix E. It would seem that Ontario's statutory provisions are clearer than those under the Uniform Act in that Ontario expressly stipulates that the capital value is included both for the purpose of determining the value of the estate and also for the purpose of being subject to an order under the Act.

In addition, section 72 of the Ontario Act is broader than the scope of the Uniform Act as it includes the designation of a beneficiary of a death benefit under a pension fund, and an annuity, and expressly includes a retirement savings plan and a homeownership savings plan as defined under the Income Tax Act.

The case of Re Moores and Hughes (1981), 136 D.L.R. (3d) 516 (Ont. H.C.) illustrates the significant reforms effected through the operation of section 72 of the Succession Law Reform Act. For purposes of ascertaining the value of the deceased's estate available for the support of a dependant, an additional $365,000 in assets "outside the will" which passed to a named beneficiary under two insurance policies and a pension plan and through a joint bank account were all deemed to be owned by the deceased. While the net estate passing under the will amounted to a relatively small amount in comparison - some $40,000. And see Re Thothivan (1982), 36 O.R. (2d) 410 (Surr. Ct.); Re Chellew and Public Trustee (1984), 45 O.R. (2d) 189 (Surr. Ct.).

The principal argument in favour of including this property in the predeceasing spouse's inventory is that if a spouse exercises some form of effective ownership of, control over or enjoyment in his/her property until death, the surviving spouse should be entitled to seek his/her fair share of same. This, together with the fact that, for the most part these very same property acquisitions would be accounted for in a division during the spouses' joint lives has persuaded us to include certain will substitutes as part of the spouse's estate.

It is the Commission's view that the value of property disposed of by the predeceasing spouse by way of any of the included will substitute devices should be accounted for in the predeceasing spouse's inventory of property for purposes of determining whether or not a balancing claim is payable. We think it important to specify the various will substitute arrangements if certainty and predictability for the transferor spouse and the transferee are to be achieved. It should, however, be borne in mind that the property which is the subject matter of a particular will substitute arrangement would only be included if it otherwise would have been shareable and considered as part of the spouse's inventory of property at death.

These will substitute arrangements are not often accompanied by consideration. To the extent that the spouse did receive a fair and reasonable consideration in money or money's worth, that value would be excluded from the spouse's inventory. Our intention is simply to include gratuitous will substitute arrangements.[208] Accordingly, we recommend:

> *RECOMMENDATION 51*
>
> *That the value of the property transferred by the deceased spouse to or for the benefit of any person other than the surviving spouse should be added to the inventory of assets of the deceased spouse to the extent that the deceased spouse did not receive a full and adequate consideration in money or money's worth, if the transfer is any one of the following:*

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[208] We have observed that this same approach is adopted under section 2-202 of the American Uniform Probate Code.

(a) a gift mortis causa

(b) any transfer whereby property is held at the time of the spouse's death by the spouse and another with the right of survivorship;

(c) any transfer of property in trust or otherwise, to the extent that the deceased spouse, at the time of death, retained a power, either alone or in conjunction with others, to revoke, to consume or to dispose of the principal thereof for his/her own benefit;

(d) any transfer of property under which the spouse retained at the time of death the possession of or enjoyment of or the right to income from the property;

(e) the designation of a beneficiary to receive an amount payable under a policy of insurance which was effected on the life of the deceased and owned by him or her;

(f) the designation of a beneficiary to receive a death or survivorship benefit in regard to an annuity, pension plan, retirement savings plan or any other similar plan intended to provide income for retirement.

We recognize that the inclusion of the will substitutes recommended above may pose a number of problems, and that further clarification and provisions are required. We deal with each of these concerns in turn. Most of the proposed solutions are drawn from the Uniform Dependants' Relief Act.

First, with respect to joint bank accounts and jointly owned real property, we wish to ensure that any money contributed by the other joint owner should not be included in the predeceasing spouse's inventory of shareable gains. The value to be considered as part of the spouse's inventory should be determined by reference to the extent that the funds on deposit were the property of the deceased immediately before the deposit.[209] If real property is held as a joint tenancy, the amount to be included in the deceased spouse's inventory should be taken to be equal to the ratio of contribution of the deceased to the contribution of all other joint tenants multiplied by the fair market value of the property at the time of the deceased's death. In addition, the burden of proving that the estate of the predeceasing spouse should account for any part of the funds or property acquired by way of survivorship, should lie upon the spouse seeking an accounting on death. Accordingly, we recommend:

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[209] For the most part, we follow the approach adopted under the Uniform Dependants' Relief Act. With respect to the valuation of real property held as a joint tenancy, we adopt Alberta's proposals. Supra n. 180 at 119.

RECOMMENDATION 52

That funds in a joint bank account should be included in the inventory of the deceased spouse only to the extent that the funds on deposit were the property of the deceased spouse immediately before the deposit.

RECOMMENDATION 53

That where real property is held as a joint tenancy, the amount to be included in the inventory of the deceased spouse should be the ratio of the contribution of the deceased to the contribution of all the parties multiplied by the fair market value of the property at the time of the deceased spouse's death.

RECOMMENDATION 54

That a spouse seeking an accounting on death has the burden of establishing that the funds or property, or any portion thereof, belonged to the predeceasing spouse.

A further practical difficulty that the inclusion of jointly held property might give rise to is a reluctance on the part of a person to pay out or to comply with the terms of the jointly held property for fear that liability might attach to their actions. For example, a financial institution may be hesitant to pay out any monies to the surviving joint account holder. We think that a person making payment or complying with the terms of the jointly held property should be protected. We propose that any person may make the appropriate payment or transfer in accordance with the terms of the jointly held property unless personally served with a suspensory order. In order to obtain a suspensory order, it should first be incumbent on a surviving spouse to satisfy the judge that there may be insufficient assets in the net estate of the deceased spouse out of which to effect a balancing claim. Accordingly, we recommend:

RECOMMENDATION 55

That any person may pay or transfer any funds or property to any person otherwise entitled unless the person has been personally served with a certified copy of a suspensory order enjoining such payment or transfer.

RECOMMENDATION 56

That a judge may make a suspensory order directing the person who benefitted or any person who holds property on behalf of the person benefitted not to transfer any property which is the subject matter of the transactions set out in recommendation 51, where in the opinion of the judge there may be insufficient assets in the net estate of the deceased spouse out of which to provide a balancing claim for the survivor.

Finally, the Commission recognizes that life insurance proceeds may be payable to a specific beneficiary for business reasons or purposes. For example, the deceased spouse may have owned and maintained a policy payable to a third party in order to provide funds to maintain the continuity of the business operation in the event of his/her death. In addition, the deceased spouse may have named a former spouse as a specific beneficiary pursuant to a court order under "The Family Maintenance Act"[210] or in accordance with a separation agreement. To protect such arrangements, we think that where an amount under a life insurance policy is payable to a third party for the purpose of providing funds in respect of a business undertaking or pursuant to a court order or separation agreement, it should not be considered as part of the predeceasing spouse's inventory of gains. Accordingly, we recommend:

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[210] "The Family Maintenance Act", C.C.S.M. c. F20, s. 8(1)(k) provides that a court may order a spouse who has a policy of life insurance to designate the other spouse or a child as the beneficiary irrevocably or for such period as is fixed in the order.

RECOMMENDATION 57

That proceeds payable under a life insurance policy should not be included in the deceased spouse's inventory of assets where such proceeds are:

(i) payable to a third party in respect of a business undertaking;

(ii) pursuant to a court order under "The Family Maintenance Act"; or

(iii) in accordance with the terms of a separation agreement.

(a) Recovery from Third Parties

The Commission also considered the question as to whether any safeguards should restrict recovery from a third party who has benefitted from a will substitute device. In particular, we investigated whether an intent to evade an accounting must be established and whether a fixed cut-off period should govern the review of will substitutes. It appears to us that there would be no justification for proposing either of these safeguards.[211]

In general, with respect to a will substitute device, on the eve of a spouse's death the amount of property or its destination is not firmly fixed. Just as the beneficiary's expectations can be destroyed by the testator changing his will, so may the hopes of a third party be defeated by a spouse withdrawing the property from or revoking the will substitute arrangement. Hence, a third party expecting to benefit under a will substitute arrangement should not reasonably have a firmer expectation than a beneficiary under a will. At all events, the third party ought not to have spent money or otherwise ordered his affairs on the assumption that the property will be his/hers.[212] Quite simply stated, in our view, there is little reliance interest on the part of a third party which warrants either form of protection.[213]

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[211] We have observed that neither the Uniform Dependants Relief Act nor the Uniform Probate Code restrict recovery to will substitutes arranged within a fixed period of time prior to the death of a spouse. Nor does either Act require proof of an improper intent on the part of a spouse making a will substitute arrangement

[212] Law Reform Commission of New South Wales, Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916 (1974) Sydney at 105.

However, as is the case with unreasonably large transfers, we think that the right to seek contribution should only arise if there are insufficient assets in the net estate out of which to satisfy the balancing claim. In addition, the maximum amount which the third party should be called upon to contribute should not exceed the value of the benefit received less the value of the consideration, if any, provided by the third party. The beneficiary under a will substitute arrangement should be protected to the extent that (s)he gave consideration for the benefit. Finally, where the deceased has effected a number of the defined will substitute arrangements no beneficiary under such an arrangement should be called upon to contribute more than his/her pro rata share in order to satisfy the deficiency. Accordingly, we recommend:

RECOMMENDATION 58

That where the deceased spouse has effected any of the transfers set out in recommendation 51, and the deceased's estate is unable to satisfy any amount payable to the surviving spouse in an accounting of property on death, recovery of the value of the benefit received or to be received, less the value of the consideration in money or money's worth, if any, may be ordered from the recipient of the transfer.

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[213] Generally speaking, a reliance interest based on mere lapse of time would be negligible when the property is received only at death, for example, a gift mortis causa or proceeds of a life insurance policy. We acknowledge, however, that the expectation of a third party benefitting under the will substitute would vary somewhat with the type of transfer. For example, there may be a greater expectation with respect to an irrevocable trust than with respect to a revocable trust.

RECOMMENDATION 59

That where the spouse has made several of the transfers set out in recommendation 51, no person to whom property was transferred should be ordered to pay more than his/her pro rata share.

We wish to avoid any possibility of conflict or overlap between the treatment of will substitute devices and the treatment of unreasonably large dispositions.[214] Hence, we propose that the various will substitute devices should be specifically excluded from the operation of the provisions governing unreasonably large dispositions. Accordingly, we recommend:

RECOMMENDATION 60

That the transfers listed in recommendation 51 should be specifically excluded from the application of the provisions respecting unreasonably large dispositions.

5. Estate planning device

There is one very important consideration which we wish to incorporate into the proposed anti-avoidance scheme which is not found under the Uniform Dependants' Relief Act, namely, whether the spouse consented to the impugned disposition or will substitute arrangement. The Commission is of the view that it would be a most useful estate planning tool to allow spouses by way of written consent to exclude property transferred inter vivos or by way of a will substitute arrangement from the operation of the proposed anti-avoidance measures.

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[214] For example, in an allocation of property on death, a donatio mortis causa may be characterized as an unreasonably large disposition. Similarly, the transfer of real property by a spouse into a joint tenancy in realty, with the spouse and a third party as the joint owners, might be viewed as an unreasonably large disposition of property.

We have observed that under the American Uniform Probate Code any transfer is excluded if made with the written consent or joinder of the other spouse.[214a] In this way the transferor spouse can assure the effectiveness of a proposed transfer by having his/her spouse consent. Similarly, if the spouse consents to the transfer, the third party can be assured that (s)he will not later be called upon to contribute to a spouse's balancing claim.

We think that this consent should be in writing and refer specifically to the property transferred and to the recipient. As well, the consent should include an express waiver by the spouse of inclusion of the transfer in the transferor spouse's inventory of property for purposes of any accounting of property either on death or during the spouses' joint lives. For greater certainty, the legislation should set forth a prescribed form for this consent.

One can only conjecture about the extent to which spouses will consent to otherwise tainted transfers without being fully apprised of their rights. It is hoped that from a reading of the prescribed form of consent itself, a spouse will understand fully the effect of any consent which (s)he may execute. It should, of course, be open to the court to review this consent where, for example, it is the product of undue influence or duress. Accordingly, we recommend:

RECOMMENDATION 61

That any unreasonably large disposition of property or any transfer set forth in recommendation 51 should be excluded from the transferor spouse's inventory of property if made with the written consent of the other spouse in the manner and form prescribed by statute.

[214a] Uniform Probate Code, section 2-202(1).

6. Operation of anti-avoidance measures on an intestacy

It should be recalled that in our earlier recommendations we proposed that in the event of an intestacy the surviving spouse may elect to seek an allocation of property on death. However, all benefits received by way of intestate succession must be charged against any balancing claim payable in favour of the surviving spouse. In practical terms, it is only where the predeceasing spouse has transferred property to others and substantially reduced the net intestate share that the election to seek an accounting on death would yield a greater entitlement to the surviving spouse than a distribution under "The Devolution of Estates Act".

In such a case, the quantum of the balancing claim should first be determined in the same manner as an ordinary accounting on death without considering the provisions of "The Devolution of Estates Act". The intestate benefits payable to the survivor must then be ascertained. Having charged all entitlement under "The Devolution of Estates Act" against the balancing claim, the survivor may be faced with a deficiency of assets in the intestate estate in order to satisfy the balancing claim. In accordance with the general rules governing recovery from third parties, contribution may be sought from third parties who are the recipients of an unreasonably large disposition or a will substitute device.

It remains to consider whether or not the issue of the intestate who would otherwise be entitled to a distributive share under "The Devolution of Estates Act" should be called upon to contribute to the balancing claim. Consider the following illustration. Assume that the deceased spouse has died intestate with shareable property in the estate valued at approximately $60,000 and, for the sake of simplicity, that the surviving spouse has no shareable assets. Two children of the deceased survive him/her. Just prior to death the deceased transferred $40,000 to a friend by way of gift mortis causa and transferred a total of $200,000 to two relatives. Assume further that the first transaction would be characterized as a will substitute and that the latter transactions would be held to be unreasonably large dispositions which the recipients knew had been made by the spouse with a view to preventing or reducing the amount of a balancing claim payable to the survivor. The balancing claim in favour of the surviving spouse would total $150,000, one-half of the deceased's "expanded" inventory of assets totalling $300,000. Pursuant to "The Devolution of Estates Act", the survivor would be entitled to a preferential share of $50,000 and a further distributive share of $5,000. This entitlement would be charged against the balancing claim, leaving a deficiency of $95,000.

Should the deceased's two surviving issue, who would be entitled to a total distributive share of $5,000 pursuant to the provisions of "The Devolution of Estates Act" contribute equitably to this deficiency? We think so. These assets comprise part of the deceased's intestate estate and the surviving spouse should be able to look to these assets in order to satisfy the deficiency.

In order to determine the contribution needed from each person so as to satisfy the deficiency, it would be necessary to determine the pro rata proportion of each recipient of the deceased's shareable estate. In order to calculate these amounts, the maximum contribution which may be sought from each of the recipients, determined in accordance with the rules respecting recovery from third parties, would be used as the numerator. The total sum of each of the maximum contributions which may be sought from the respective recipients would be used as a denominator. This fraction would then be multiplied by the deficiency. The resultant calculations equal each of the recipients' pro rata contribution. An example is set forth in Appendix F illustrating this calculation. Accordingly, we recommend:

RECOMMENDATION 62

That where there are insufficient assets in the intestate's estate to satisfy the balancing claim payable to the surviving spouse in an accounting of property on death, liability for the unsatisfied portion of the balancing claim should be equitably apportioned among any recipient of an unreasonably large disposition, any beneficiary under a will substitute device and any issue of the intestate spouse in proportion to the value of their interests in the intestate's estate.

7. The review of contracts to leave property by will

Another means by which a spouse may defeat or jeopardize an accounting of property is by making a contract to leave property by will. Our concern is directed to those contracts which attempt to transfer property which otherwise would have been shareable and included in the deceased spouse's inventory of gains.[215] The Commission has considered whether any part of the burden of the balancing payment should be borne by the promisee under an enforceable contract to leave property by will.

A contract to make a will contemplates a promise by a spouse to a promisee that the spouse will leave a legacy or devise either to the promisee or to a designated third party. The spouse usually retains full use of and enjoyment of the property which is the subject matter of the contract during his/her lifetime. In return for the promise, the spouse often obtains material support or personal services from the promisee. It is to be emphasized that this arrangement is a contract, not a will; the substantive and formal validity of the arrangement depends on the law of contracts.[216]

To be sure, the promisee is not a mere voluntary transferee; (s)he has provided consideration and undoubtedly relies on the contract being fulfilled.[217] But should the provision of some consideration of itself foreclose the surviving spouse? It would be a rare case indeed where some form of consideration could not be worked into the arrangement. At issue is the proper balancing of the principle of sanctity of contract with the recognition of the surviving spouse's contribution to the marriage by way of an equalizing claim.

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[215] The American experience has been that these contracts often involve ante-nuptial contracts made between a spouse (the promisor) and a third party long before the promisor met the surviving spouse. It is to be remembered that the value of assets acquired prior to marriage would not be shareable in an allocation of property. Hence, where pre-acquired property is the subject matter of a contract to leave property by will, there should be no interference with such a contract in an accounting.

[216] It is necessary, as with any other kind of contract, to prove the existence of all the requisite contractual elements. See generally Hendry v. Zimmerman, [1948] 1 W.W.R. 385 (Man. C.A.); Schaefer v. Schuhmann, [1972] A.C. 572 at 583 (P.C.).

[217] It is conceivable, however, that the contract is simply under seal in which case, consideration is unnecessary.

The related problem as to whether a testamentary provision made in pursuance of a valid contract is unassailable arises in proceedings under "The Testators Family Maintenance Act". That Act, however, sets forth the criteria which justify intervention with contracts to devise property by way of will.[218] Section 18 of "The Testators Family Maintenance Act" provides that where the deceased spouse has bona fide entered into a contract to leave property by will, and has fulfilled that obligation in the will, such property is exempt from the statute except to the extent that the value of the property in the will exceeds the consideration received by the deceased.[219] We think that if the policy behind the balancing claim under a deferred sharing regime is to be given full weight, our anti-avoidance scheme must contain some legislative provision permitting the review of contracts to leave property by will. The competing equities of a contractual promisee with those of the surviving spouse warrant statutory recognition and the criteria should be set forth upon which both claims and demands may be enforced.

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[218] There is no specific statutory provision or direction under "The Dower Act" concerning contracts to devise property by will. Whether or not the surviving spouse could cause property which is the subject matter of an enforceable contract to leave property by will to be included in the computation of the fixed share appears to depend upon whether the promisee is viewed as a creditor of the estate or a beneficiary under the will.

[219] The origin of this provision is found in section 15 of the Uniform Dependants' Relief Act. This section would appear to be a legislative response to the case of Dillon v. The Public Trustee of New Zealand, [1941] A.C. 294 (P.C.). There the Privy Council held that the property devised or bequeathed pursuant to a contract entered into inter vivos for valuable consideration may be employed to satisfy an order for dependants. The rights of the promisee were characterized as those of an ordinary beneficiary under a will and hence, were subject to the same disabilities.

This decision has been the object of adverse comment. See e.g. D.M. Gordon, "Conflict Between Limitations on Testamentary Power by Statute and Contract", (1941) 19 Can. B. Rev. 603; Laidlaw J.'s dissent in Olin v. Perrin, [1946] O.R. 54 at 65 (C.A.).

The majority of the Privy Council, however, declined to follow the Dillon case in Schaefer v. Schulman, supra n. 216. Lord Simon of Glaisdale dissented. The Privy Council found that the promisee under an enforceable contract to leave property by will has rights which exist independently of the will and so is not simply a legatee. Accordingly, the property under the contract is not subject to claims by dependants under family provision legislation.

This judicial conflict would appear to stem from differing views as to how the person named in both the contract and the will is to be classified; one view perceives him as a beneficiary of the deceased, the other as a creditor of the estate.

It is the Commission's view that these contracts should be respected to the maximum extent, consistent with ensuring payment of a balancing claim. Our approach is similar to the proposals made with respect to the other anti-avoidance measures identified. We think that the property which is the subject matter of the contract should not generally be liable to the incidence of a balancing payment unless the court is satisfied on three points.

First, the contract should only be interfered with where the value of the property furnished by the deceased spouse exceeds the consideration provided by the promisee to the contract.[220] To the extent that the promisee has provided a full and adequate consideration, we would treat him as any other creditor under the proposed regime. That is, the balancing payment of the surviving spouse could only be met from the net estate remaining after the transfer of the property in accordance with the terms of the contract or the recovery of appropriate damages in the event of its breach. Second, the spouse must have made the contract to leave property by will with the intention of defeating or reducing a likely balancing claim. We do not wish to affect contracts made by a spouse in good faith and in the normal course of arranging his/her affairs.[221] In assessing whether this intent was present, the court would consider all the facts and circumstances in which the contract was made.[222] Third, the promisee must have had actual or constructive notice of the spouse's intent.[223]

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[220] We later discuss in greater detail how the consideration is to be assessed.

[221] We have observed that Lord Cross, in delivering the judgment of the Privy Council in Schaefer v. Schuhmann confined his remarks to contracts made by a testator not with a view to excluding the jurisdiction of the court under the Act but in the normal course of arranging his affairs and to "bona fide" contracts. Supra n. 216 at 592.

In England, the power of the court to review contracts in the context of dependants' relief is also restricted to those contracts made with an intent on the part of the deceased to defeat an application for family provision, See Inheritance (Provision for Family and Dependants) Act 1975, c. 63, s. 11.

Where the court is satisfied on these three points, the amount by which the value of the property exceeds the consideration received by the deceased spouse in money or money's worth should be added to the deceased spouse's inventory of gains. Where there are insufficient assets in the predeceasing spouse's estate to effect a balancing claim, the promisee would be liable to contribute no more than the amount by which the value of the property exceeds the consideration.

The Commission has also considered the effect of these contracts in relation to a balancing claim where the predeceasing spouse has breached the contract by failing to make a will in accordance with the agreement. Depending on the nature of the contract, when the deceased spouse has failed to fulfil his obligation, the promisee may either seek contractual damages or may seek specific performance of the contract.[224]

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[222] Most of the factors set forth at page 129 would be equally applicable in ascertaining the intent of a spouse respecting contracts to devise property by will.

[223] We prefer this approach over that under "The Testators Family Maintenance Act". Section 18 of "The Testators Family Maintenance Act" would seem to indicate that where there is mala fide solely on the part of a spouse, then the whole of the property devised should be available to satisfy an order under the Act. Bearing in mind that the promisee has provided some form of consideration, we do not think that contribution from the promisee should be permitted when (s)he is not privy to an intent on the part of a spouse to evade a balancing claim.

[224] Damages have been awarded for anticipatory breach in the lifetime of the promisor; this has occurred where the contract was to leave a specific asset to the promisee by will, and the promisor sold the promised asset. See Synge v. Synge, [1894] 1 Q.B. 466 at pp. 470-471 (C.A.) See generally C.H. Sherrin, "Contracts to Make Wills" (1972), N.L.J. 576.

Section 18 of "The Testators Family Maintenance Act" does not expressly provide what happens if the deceased has failed to carry out the promise. It has been suggested that a promisee, under this section, would be better off if the testator failed to comply with the contract.[225] That is to say, the promisee would in this case rank as a creditor of the estate and as such would take in priority to any dependants' relief order even if the promisee's consideration were inadequate. In our view, the promisee should not have a greater right in the event of non-performance of the agreement than(s)he has on its performance. Where the spouse has failed to perform his/her promise, we think that the court should have like powers, exercisable in like circumstances, as in the case where the spouse has made a will in accordance with the agreement. Accordingly, we recommend:

RECOMMENDATION 63

That subject to recommendation 64, where a spouse has entered into an enforceable contract to devise property by will, the court may order the promisee to contribute to a balancing claim, whether or not the spouse complied with the agreement, where the court is satisfied that:

(1) the value of the property exceeds the value of the consideration received by the spouse in money or money's worth;

(2) the spouse entered into the contract with the intention of removing property from his/her shareable estate in order to reduce or defeat a balancing claim;

(3) the promisee to the contract had actual or constructive notice of this intent; and

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[225] By adopting the creditor theory of the rights of the promisee, it would appear to follow that the measure of damages would not then be reduced as a result of dependants' relief legislation; the whole value of the property would be payable to the promisee in priority to the claims of other dependants. See Schaefer v. Schuhmann, supra n. 216.

(4) there would be insufficient assets in the net estate to effect a balancing claim after the inclusion in the appropriate spouse's inventory of property of the amount by which the court considers the value of the property to exceed the value of the consideration received.

RECOMMENDATION 64

That in exercising its power in relation to these contracts, the court should ensure that any order will not deprive the promisee of the right to receive property or to recover damages for the breach of the contract in an amount which is not less than the value of the consideration received by the deceased in money or money's worth.

The Commission is mindful that there may be some rather difficult evaluation problems confronted when reviewing the consideration provided by the promisee. In particular, a continuing course of conduct over the lifetime of the promisor would appear to be the usual type of consideration, and its value depends upon the life expectancy of the promisor. The promisee, for example, may remain working on the family farm for no wages on the understanding that it will be devised to him/her, or the promisee may undertake housekeeping or nursing services for the lifetime of the promisor at no wages.[226]

Our deliberations, however, have been assisted by the Alberta Institute of Law Research and Reform in its very lucid discussion on this subject matter in the context of dependants' relief legislation. We now set forth its comments and some of the factors which it recommended that the judge should have regard to in assessing the adequacy of the consideration furnished by the promisee:

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[226] Schaefer v. Schuhmann, supra n. 216 (A testator had promised to leave a house to his housekeeper in his will, in consideration of her continuing to remain in his service without remuneration for the rest of his life); Dillon v. Public Trustee of New Zealand, supra n. 219. (A testator had agreed, as part of a settlement of earlier litigation and in consideration of his two sons farming his land in partnership, to devise his farms in equal shares to three of his five children. The father remarried and executed a new will leaving the property in accordance with the earlier agreement. His second wife applied for family relief.)

> Other matters which we think the judge should consider are as follows: the reasonable expectations of the parties as to the life expectancy of the deceased at the time of the contract; if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; if a consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise . . . .[227]

The Commission has concluded that some of these factors go a long way in helping to solve the difficult valuation problems and should be incorporated. We would, however, limit the interference with a contract to leave property by will to those cases where the value of the property exceeded the value to the deceased at the time of the making of the contract. Consider the following example: a spouse enters into a contract to devise a house valued at $40,000 to a third party in consideration of a promise by the third party to provide housekeeping services to the spouse for life without remuneration. The spouse may have an expectation of life of ten years but is killed in an accident the following day. What is the consideration received by the spouse? One day's care or the promise of care for life? It should, in our view, be open to the court to say that this contract was a fair bargain, in light of future uncertainties, and that the promisee should not be called upon to contribute to the balancing claim.[228] Accordingly, we recommend:

RECOMMENDATION 65

That in determining whether the value of the property exceeds the value of the consideration received by the spouse and in what manner to exercise its powers, the court should have regard to:

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[227] *Supra* n. 180 at p. 107.

[228] Simply stated, the consideration must bear a close relation to the value of the property when the agreement was entered into but having regard to the expected performance, that is to say, the life expectancy of the promisor. In other words, the consideration may be less than the actual value in view of the expected delay in performance, but, on the other hand, the agreement must take into account the probable increase in value during that time.

(a) the value of the property and the value of the consideration at the date of the contract;

(b) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract;

(c) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; and

(d) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise.

In its Report on Family Relief, the Alberta Institute of Law Research and Reform also recommended that its anti-avoidance scheme cope with the sitation where spouses agree not to revoke the will.[229] Spouses may, by way of separate mutual wills or by one joint will, make a common disposition of their respective property, usually to the children of the marriage, and they may also agree not to revoke the will. Where the surviving spouse makes a new will in defiance of this arrangement after the death of his/her spouse who has complied with the arrangement, the beneficiaries of the first will could bring an action against the personal representative and require him to hold the property on an implied or constructive trust in favour of the beneficiaries.[230]

While the agreement not to revoke a will is in one sense a species of a contract to make a will, we do not think that the second spouse should be permitted to encroach upon the trust in order to satisfy a balancing claim. In our view, the nature of the consideration furnished by the spouses, which is the mutual promise not to revoke the will, while not capable of specific valuation or quantification, should protect these arrangements. In addition, these arrangements will often involve property acquired during the first marriage and as such its pre-marital value would be excluded, in any event, in an accounting sought by the second spouse.

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[229] Supra n. 180 at 107.

[230] The breach of the agreement not to revoke the will might arise where, after the death of a spouse, the surviving spouse remarried and makes a new will leaving all property to the second wife.

8. Ancillary powers

In connection with the exercise of the jurisdiction which we have proposed under our anti-avoidance scheme in recommendations 45, 58 and 63, the court may require further ancillary powers. For example, the court may want to cause the surviving tenant of a joint tenancy to relinquish the property acquired by way of survivorship, and direct a cash payment to be made out of the estate to the surviving joint tenant for the value of consideration furnished. We think that the court should be able to make such orders in relation to the matter as may appear to be just and equitable having regard to all the circumstances. Accordingly, we recommend:

RECOMMENDATION 66

That in exercising its powers under recommendations 45, 58 and 63 the court may give such consequential directions as it thinks fit for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby.

9. Joinder of parties

When a spouse questions the propriety of a particular disposition of property or a given will substitute arrangement, or seeks to include property which is the subject matter of a contract to leave property by will, it is likely that resort will have to be made to a court application in order to resolve the dispute. The person who has benefitted from the transfer in question should also be named as a party to the application. Where this has not occurred, we think that the court should have power to order the joinder of any necessary additional parties for the purpose of reviewing the transfer. Accordingly, we recommend:

RECOMMENDATION 67

That for the purposes of reviewing a transfer of property, the court should have power to order the joinder of any necessary additional parties.

10. Transitional provision

By incorporating anti-avoidance measures into the proposed regime, we hope to prevent a spouse from defeating an allocation of property on death. It might, therefore, be argued that it would be appropriate for these anti-avoidance measures to apply to transactions made before the scheme takes effect as long as the deceased spouse died after the coming into force of the general deferred sharing regime on death. We have, however, determined that in an accounting on death, all of the proposed anti-avoidance protections should only apply prospectively and not alter any unreasonably large disposition, will substitute, or contract made or effected before the general enactment of the proposed anti-avoidance scheme. Of course, for purposes of an accounting during the spouses' joint lives, the propriety of any transfer, made before the recommendations respecting unreasonably large dispositions take effect, should be determined in accordance with the governing provisions of the present "Marital Property Act". Accordingly, we recommend:

RECOMMENDATION 68

That none of the proposed anti-avoidance measures operative on death should apply to any unreasonably large disposition, will substitute or contract entered into before the coming into force of the anti-avoidance measures operative on death.

PART TWO: AN EXAMINATION OF THE HOMESTEAD PROTECTIONS

CHAPTER 5

SPECIFIC RECOMMENDATIONS FOR REFORM: THE HOMESTEAD PROTECTIONS

A. Introduction

In this Report thus far, we have focused our attention principally on spousal property rights on death. We turn now to consider the balance of "The Dower Act" which generally sets forth the protections afforded to the family home or homestead. Broadly stated, the Act prohibits any disposition of the homestead without the written consent of the non-owning spouse. As well, the surviving spouse is granted a life estate in the homestead upon the death of his/her spouse.

In order to provide a background against which the emergence of these homestead protections can be seen in perspective, we begin with a very brief historical account. We then examine both the nature and function of the surviving spouse's life estate and we consider whether that interest during its continuance should be exempt from specified claims of creditors. Attention then turns to the scope of the homestead definition. Finally, we review the measures which attempt to secure the spouses' rights in the homestead during their joint lives with a view to determining whether reform is necessary and the nature of such reform.

While we acknowledge the lack of expertise that is required in order to draft legislation, the Commission considered that it might be helpful to attach a draft Act. Without doubt, the drafting of the Act could be improved upon and it is offered simply with the view that it may be useful as model legislation. For the most part, this draft Act contains few new sections. It is set forth in Appendix G.

B. HISTORICAL BACKGROUND; AN AMERICAN INSTITUTION

The earliest homestead legislation appears to be a uniquely American contribution to the law of property which traces its origins to a statute of the Republic of Texas enacted in 1839.[231] The fundamental aim of the legislation was the protection of the family home. The homestead proper was the dwelling house which constituted the family home together with the land on which it was situated.

Without a doubt, the homestead protections differed from common law dower.[232] The principal difference was that the former stemmed from a much broader public policy standpoint. Homestead legislation addressed more than simply the concern of providing a form of maintenance to the widow; it sought to ensure that the homes of the nation were beyond the reach of financial misfortune. This served to encourage home ownership and to attract settlers.

> The statutes were intended to secure to the owner a home for himself and his family, and, in case of his death, for the surviving members of his family, regardless of his financial condition - whether solvent or insolvent, and without reference to the number of his creditors, and without regard to the extent of the estate or title by which the homestead property may be owned. The laws were not based on the principles of equity, nor did they in any way yield thereto; their purpose was to secure the home to the family even at the sacrifice of just demands, the preservation of the home being deemed of paramount importance.[233]

The principal policy of the homestead laws was generally regarded as the security of the family which, in turn, enured to the benefit of the community to the extent that this security prevented impoverishment and promoted the stability and welfare of the state. The rights bestowed on the spouse of a homestead owner were simply part of this much broader purpose.

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[231] A.J. Casner, (ed.) of the American Law of Property (1952-54) sets out this enactment at p. 811. A good discussion of the American homestead laws may also be found in 40 Am. Jur. (2d) at p. 115 et seq. And see 40 Corpus Juris (Secundum) at p. 422 et seq.

[232] It should be recalled that common law dower simply provided the wife with the right to remain in the chief house of her husband during the quarantine of 40 days from the date of his death, during which period her life interest in one-third of her husband's lands was to be assigned.

[233] 40 Am. Jur. (2d) at p. 118-119.

The second important distinction between homestead and dower concepts is actually related to the first. Although dower and homestead rights were both aimed at protecting the wife after the death of her husband, homestead rights were also directed at protecting the wife during the life of her husband.[234]

While the homestead protections have varied considerably from state to state since their inception, there were three principal consequences which generally followed when a particular property constituted the homestead:

(a) the use of the property, after the owner's death, was regulated for the benefit of the family;

(b) the property was exempt from execution for certain kinds of debts;

(c) the owner's freedom of disposition was limited, since the consent of the non-owning spouse was required for a conveyance or encumbrance of the property.

Legislation in Manitoba has expressed each of these objectives but in different statutes. Protection of the family home from specified creditors may be traced back to 1880[235] and is the aim of section 13 of "The Judgments Act".[236] The second and third goals of American homestead legislation have been incorporated into our "Dower Act". At present, there are also traditional homestead protections operative in the provinces of British Columbia, Alberta and Saskatchewan but these protections differ, both as to substantive provisions and procedural requirements, from one another and from those in place in Manitoba.[237] We shall attempt to identify a few of these differences as we explore each of the homestead protections in greater detail.

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[234] John Williams, "The Homestead Act: Reflections on Its Purpose and Operation in Saskatchewan" (1984), 48 Sask. L. Rev. 57 at 61.

[235] The Administration of Justice Act, Consolidated S.M. 1880, c. 37, s. 85(8) and (9).

[236] "The Judgments Act", C.C.S.M. c. J10.

C. Surviving Spouse's Rights in the Homestead on Death

We turn now to examine the first of the three principal consequences of homestead protection - the statutory life estate of the surviving spouse.[238] Irrespective of any testamentary disposition to the contrary, s. 14 of "The Dower Act" provides the surviving spouse with an estate for his/her natural life in the homestead upon the death of the owning spouse. This right to a life estate in the homestead is in addition to the right of the survivor to elect a fixed share of the deceased's estate. It may also be invoked in the case of an intestacy. Subsection 14(1) reads as follows:

> 14(1) Subject to subsection (4) of section 4, upon the death of a married man whose wife survives him, the wife is entitled to an estate for her natural life in his homestead as fully and effectually, and to the same effect, and under the same conditions,

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[237] However, none of the provinces have embodied these three elements in a single statute and consequently, there is a confusing variety of titles. In British Columbia, see Homestead Act, R.S.B.C. 1979, c. 173; Land (Wife Protection) Act, R.S.B.C. 1979, c. 223; Estate Administration Act, R.S.B.C. 1979, c. 114. In Alberta, see The Exemptions Act, R.S.A. 1980, c. E-15; The Dower Act, R.S.A. 1980, c. D-38. In Saskatchewan, see The Exemptions Act, R.S.S. 1978, c. E-14, as am. by S.S. 1983, c. 41, s. 2; The Homesteads Act, R.S.S. 1978, c. H-5.

For an excellent discussion of these homestead protections, see W.F. Bowker, "Homestead Laws in the Four Western Provinces", which is set out at I-43 of the introduction to Matrimonial Property Law in Canada, supra n. 77.

[238] For the purposes of the present discussion it is assumed that there are sufficient assets in the estate to cover liabilities without having to resort to the homestead. We later consider the issue as to whether the claims of the deceased spouse's creditors should take priority over the life estate in the homestead.

> as if he had left her by will such a life estate in the homestead; and every disposition by will of a married man of his homestead, is subject to the life estate of the wife.

1. The nature of the life estate

It would appear that the life estate does not vest in the survivor on the death of the owning spouse, but only upon a conveyance from the personal representative of the deceased owner to the survivor.[239] Strictly speaking, it would follow that should the surviving spouse be out of possession at the time of the other spouse's death, (s)he would have no legal right to enter on and occupy the homestead until it is actually conveyed or even to remain in possession without the consent of the deceased's personal representative.

Once the life estate has been conveyed, the survivor may lease, convey or encumber the homestead to the extent of his/her interest.[240] The survivor may also join with the remaindermen and consent to convey a fee simple interest in the property; (s)he is entitled to receive such share of the proceeds which represents the value of the life interest in relation to the value of the remainder. The value of the survivor's life estate is calculated on the basis of actuarial evidence with the time of sale as the appropriate point at which to base the calculation.[241]

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[239] This is said to follow both from the wording of the section itself, ". . . as if he had left her by will such a life estate. . ." and from the legislative history of the Act. See Crichton v. Zelenitsky, [1946] 2 W.W.R. 209 (Man. C.A.). We have, however, noted that Williams C.J.Q.B. in the case of In Re Kuzy Estate (1953), 9 W.W.R. (N.S.) 675 (Man. Q.B.) questioned whether the decision in Crichton v. Zelenitsky with respect to the vesting of the life estate was consistent with the earlier Supreme Court of Canada decision, Morice v. Davidson, [1943] S.C.R. 94, which was not considered in Crichton v. Zelenitsky.

The original "Dower Act", S.M. 1918, c. 21, s. 9, provided that the homestead life estate was "hereby declared to be vested in the wife so surviving" but this provision was retrospectively repealed in 1919, "The Dower Act", S.M. 1919, c. 26, s. 12, and replaced with what is now s. 14 which omits any reference to the question of vesting.

[240] Morice v. Davidson, supra n. 239. In addition, under subsection 55(1) of "The Queen's Bench Act", C.C.S.M. c. C280, the court has the same jurisdiction as the Court of Chancery had in England on July 15, 1870 in regard to leases and sales of settled estates.

Various questions may arise concerning responsibility for expenses including taxes, levies and payments of principal and interest on mortgages or encumbrances. These questions are not unique to the surviving spouse's life interest in the homestead; they arise with respect to any life interest in real property.[242] Presumably, the survivor would be entitled to the rents and profits from the homestead, (s)he would be liable to pay the property taxes, and the interest on any mortgage, and (s)he would be bound to maintain the property in a reasonable state of repair and could not commit or suffer waste.

2. Function of the life estate; Is it pertinent today?

The principal function of the life estate is the preservation of the home for the surviving spouse and children, if any, upon the death of the owning spouse. The needs of the survivor and dependent children, if any, are as great, if not greater, after the death of a spouse, especially where that spouse is the primary breadwinner. Section 14 is designed to prevent the imposition of hardship on the surviving spouse which might otherwise arise if the family home were sold and the survivor forced to relocate elsewhere. This aim has often been confirmed by our courts. We set forth three judicial comments in order to highlight this policy:

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[241] The Supreme Court of Canada decision in Morice v. Davidson, supra n. 239, establishes the proper procedure to be followed. At p. 98 Hudson J. states:

> The net proceeds of the sale of the homestead should be divided in proportion to the respective value of the life estate and of the remainder the widow accordingly receiving out of such proceeds the share representing the value of the life estate.

The ingredients in the calculation are the interest rate, the value of the property, and the life expectancy of the surviving spouse. See In Re Zarowiecki, [1982] 4 W.W.R. 728 (Man. Surr. Ct.).

[242] The general rule for apportioning liability between life tenants and remaindermen is that the life tenant is responsible for the day-to-day ordinary or casual expenses, such as property taxes and the interest on mortgages. The remainderman would be responsible for expenditures of a capital nature which are of long-term benefit to the property.

> This legislation was enacted for the protection of the spouses and to ensure them at all times a roof over their heads notwithstanding the vicissitudes of life.[243]
>
> . . . [T]he object of the Dower Act is to provide to married persons some protection against the improvidence of their spouses during life, and against injustice upon death.[244]
>
> The leading and fundamental idea connected with a homestead is unquestionably associated with that of a place of residence for a family, where the independence and security of a home may be enjoyed without danger of loss, harassment, or disturbance by reason of the improvidence of the head or any other member of the family.[245]

The Commission is of the view that the reasons which originally motivated its passage justify the continuance of the statutory life estate today.

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[243] *Packer* v. *Packer* (1959), 31 W.W.R. 22 at 25 (Man. Q.B.). This statement was approved by the Court of Appeal in *Seroy* v. *Seroy* (1964), 50 W.W.R. 65 at 70 (Man. C.A.).

[244] *Re Rodick* (1958), 24 W.W.R. 356 at 362 (Man. C.C.).

[245] *Re Hetherington* (1910), 14 W.L.R. 529 at 532 (Sask. K.B.). This statement has been adopted with approval in *Re Tarnopolski*, (1944) 52 Man. R. 238 at 240 (K.B.).; *In Re Badner*, [1941] 3 W.W.R. 730 at 732 (Man. K.B.).

In our estimation, the function of the life estate would not be superseded by the adoption of the proposed deferred sharing regime on death. While an accounting of property on death should provide the survivor with one-half of the combined shareable gains of the spouses, this allocation would not ordinarily ensure the preservation of the family home. Should the combined marital gains of the spouses be substantial, then a balancing claim in favour of the surviving spouse might be of such a quantum that it could be satisfied by way of the transfer of the home to the surviving spouse; in which case, the survivor's right to remain in possession and enjoyment of the home is maintained.

Where, however, there is no balancing claim in favour of the surviving spouse or where it is not of a sufficient amount to permit the transfer of the home, the fundamental aim of the homestead laws would be thwarted. This is particularly so in the case of estates where the home is the only substantial asset and where it is registered in the name of the predeceasing spouse. Similarly, the entitlement to a life estate in the homestead may play a key role where the home is pre-acquired property or an inheritance such that its value would not be shareable in an allocation of property on death.

While we have concluded that the statutory life estate in the homestead should be maintained, it is not contemplated that it will often be invoked. Since, the majority of spouses hold title to their home in their joint names, the surviving spouse's right of continuing occupancy in the home is often secured to the fullest extent possible by the vesting of the whole property in the survivor on the death of the other joint owner.

In our view, the right of the survivor to an estate for his/her life in the homestead should be independent of and in addition to the right to seek an allocation of property on death. This same approach is generally adopted under "The Dower Act" in that the survivor may elect a fixed share of the deceased's estate, and, in addition, is entitled to the life estate in the homestead. For purposes of determining the quantum of the balancing claim, where title is held in the name of the deceased spouse, the full value of the homestead should be included in the predeceasing spouse's inventory of property - not the full value less the value of the life estate.[246]

There is one final, and quite important point, which must be made. There may be instances where a surviving spouse wants to invoke a life estate in the homestead but there are no other assets available to satisfy the balancing claim in his/her favour, but for the homestead. In such a case, it may be appropriate for the survivor to file a caveat which would specify that, upon death of the life tenant (i.e., the survivor), the appropriate portion of the sale proceeds are to be paid into the survivor's estate.

Accordingly, we recommend:

RECOMMENDATION 69

That the surviving spouse continue to have the statutory entitlement to a life estate in the homestead of the predeceasing spouse in addition to the right to seek an accounting of property on death.

D. EXEMPTION OF THE LIFE ESTATE IN THE HOMESTEAD FROM CREDITORS

Having determined that the surviving spouse may invoke an estate for his/her natural life in the homestead upon the death of the owner spouse, the question arises as to whether that interest should be exempt from the claims of creditors. At issue is whether the law ought to protect the survivor's life estate from liability for payment of the deceased's debts and, if so, in what circumstances, and to what extent.

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[246] It should also be remembered that the survivor must include the value of all property acquired by way of survivorship in his/her inventory of property.

It must be recognized that any form of exemption is in derogation of the valid claims of creditors who have dealt in good faith with the debtor on the understanding that they would be paid. Protection of the survivor must be accomplished without unduly prejudicing those creditors. The Commission is of the view that as a general rule creditors should be able to have their claims satisfied except to the extent that it is perceived necessary to accommodate the goal of safeguarding the surviving spouse in his/her own home.

Although at common law the rights of a husband's creditors were subordinate to the widow's claim for dower,[247] the present "Dower Act" does not afford such protection to the survivor. By virtue of s. 14(1), a surviving spouse is granted a life estate in the homestead upon the death of the owner spouse "as if he had left her by will such a life estate". Those words were authoritatively interpreted by the Manitoba Court of Appeal in the 1946 decision of Crichton v. Zelenitsky.[248] The Court held that since the life estate takes effect as a devise and is accorded no special priority by the Act, the claims of the deceased spouse's creditors take priority. The homestead is thus liable to be sold, if necessary, to pay the claims of ordinary creditors thereby extinguishing the life estate of the surviving spouse.[249] The incomplete protection thus afforded a surviving spouse has attracted criticism.[250]

On the other hand, it would appear that the survivor is provided with some "limited protection" where a judgment creditor seeks to cause the sale of the homestead. Unlike the general creditor, the judgment creditor is one who has obtained judgment against the debtor in court and then registered it in the general register of the land titles office. Where judgment debts are involved, the exemption provisions of "The Judgments Act" afford limited protection to the surviving spouse.

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[247] Megarry and Wade, The Law of Real Property (4th ed. 1975), 518.

[248] Supra n. 239.

[249] It is important to bear in mind that the possibility of situations involving a sale of the homestead to satisfy the claims of creditors, with nothing being left for the surviving spouse are rare. Since most homes are held in joint tenancy they would ordinarily pass directly to the survivor under the right of survivorship.

[250] T. Hughes, "Reform of The Dower Act Rights of Widows", supra n. 24.

The effect of s. 13 of that Act, which has remained largely unchanged since 1885, is to prevent the sale of:

(1) 160 acres of farmland on which the debtor or his family actually resides, and

(2) the actual residence or home of a judgment debtor other than a farmer where the judgment debtor's interest does not exceed $2,500, or $1,500 where the judgment debtor is a co-owner.

Any farm acreage in excess of 160 acres may be sold, as may a residence or home where the judgment debtor's interest exceeds the noted dollar exemption.

In the case of Mymryk v. Canadian Permanent Trust Co.[251] it was held that the exemption of $2,500 on the sale of a residence or home of a judgment debtor is not personal to the debtor but enures to the benefit of his widow and children as well. As a matter of policy, it is not an easy task to reconcile Crichton v. Zelenitsky with Mymryk. The only real distinction between the cases is that in Crichton v. Zelenitsky ordinary creditors were involved and therefore "The Judgments Act" did not come into play, whereas in Mymryk a judgment creditor was taking proceedings under "The Judgments Act"; the creditor had obtained judgment and registered it against the executrix of the estate. It would thus appear that the general creditor is in a better position to recoup what is owed to him than the creditor who has applied for an order of sale pursuant to "The Judgments Act". This is an anomalous situation.

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[251] (1968), 63 W.W.R. 313 (Man. Q.B.)

In summary, Manitoba law offers the survivor's life interest very little protection from the claims of the deceased spouse's creditors.[252] "The Dower Act" has been interpreted so as to allow the homestead to be sold where the estate does not contain sufficient assets to meet the liabilities, and in such an event, the life interest is lost. While "The Judgments Act" prevents the sale of a rural homestead up to 160 acres, it does not provide a reasonable exemption for the urban homestead. The sum of $2,500 or $1,500 for jointly held property, is far too low for either the family or a surviving spouse, to maintain the home.[253] In addition, although the Mymryk case has determined that the urban exemption under the Act enures to the benefit of the deceased debtor's family, the Act itself does not in a specific terms extend the debtor's exemption in favour of the survivor in the event of the debtor's death. Nor is there a specific legislative provision making an exemption applicable as against the ordinary creditors of the deceased as well as judgment creditors.

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[252] This is to be contrasted with the protection granted in Saskatchewan and Alberta as well as in many U.S. jurisdictions. In Saskatchewan, The Exemptions Act, R.S.S. 1978, c. E-14, as am. by S.S. 1983, c. 41, s. 2, declares that a rural homestead up to 160 acres, and an urban homestead to the extent of $32,000, are exempt. The exemption is specifically continued after the debtor's death (in the hands of the personal representative) in favour of the widow and/or children as long as the homestead is in their use and enjoyment and necessary for their maintenance and support. The exemption is available against the claims of both general and judgment creditors.

In Alberta, the Exemptions Act, R.S.A. 1980, c. E-15, declares that a rural homestead up to 160 acres, and an urban homestead to the value of $8,000, are exempt. The exemptions are specifically extended after the owner's death in favour of the surviving spouse and/or minor children. As in Saskatchewan, the extension is conditional on the property being in the use and enjoyment of the surviving spouse and/or children and necessary for their maintenance and support.

[253] Invariably, the family's equity in the home would exceed the amount of the exemption and creditors would be able to force a sale. The amount of the exemption, once paid over to the survivor following sale, would not be sufficient to purchase a smaller and less costly home.

The problems here identified centre around inadequacies and anomalies contained within "The Judgments Act". That Act provides incomplete protection for the family home from the claims of creditors during the owner's life, a deficiency which is simply compounded after death. The negligible protection granted to the survivor's life estate is thus part of a much larger question respecting residence exemption laws generally.

It is the Commission's view that there is not now any existing framework within which to place an exemption for the homestead life estate. In our estimation, it would be inappropriate to recommend an exemption for the survivor's life estate in isolation; rather such an exemption is logically seen only in the larger context of a general review of residence exemption laws. Specifically, a consideration of an exemption for the homestead life estate must be considered as a part of two larger areas of concern:

(i) the availability and the adequacy of exemptions for the benefit of the family during owner's life. Almost all jurisdictions which grant an exemption to the surviving spouse do so by a simple extension of the owner's homestead exemption for the benefit of his family after death. This is done on the assumption that the family needs the law's protection of the home, both during the owner's life and after his death.

(ii) the position of the surviving spouse generally. Any interest in the homestead acquired by a surviving spouse, whether life estate or fee simple, and whether acquired under "The Dower Act" or by way of will or intestate succession should be protected from creditors to the same extent;

It is our opinion that "The Judgments Act" should be reviewed to determine the desirability of residence exemptions generally and to consider reform respecting (i) the quantum of the exemption for urban property, (ii) the extension of exemptions for the benefit of the surviving spouse and/or children, and (iii) the availability of the exemption in respect of all debts, not merely judgment debts.[254] Such a study is clearly beyond the scope of this Report. We have therefore concluded that it would be inappropriate to recommend, in this Report, an exemption for the homestead life estate in isolation.

E. The Scope of the Homestead Definition

Attention now turns to the question of what constitutes a homestead. Not all premises occupied by spouses as their home may be the subject of a life estate for the benefit of the survivor. Homestead under "The Dower Act" has a different meaning depending upon whether the home is situated in a "rural" or "urban" style setting.[255]

At the onset, we think it important to state that in our estimation there are two important aims that the definition of homestead must attempt to achieve. First, the definition must facilitate a reasonable degree of certainty and precision in the identification of the particular property to which the homestead protections should apply. Second, the definition must attempt to encompass a variety of dwellings, the very character of which can vary due to the highly diverse economic fortunes and styles of living.

Throughout the present discussion, it should be borne in mind that the homestead definition is germane not only to the question of the statutory life estate but also to the conveyancing requirements when a disposition of the homestead is attempted.

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[254] In 1979, this Commission issued a Report on The Enforcement of Judgments, Part II: Exemptions under "The Judgments Act" which considered most of these issues.

[255] The expressions "urban" and "rural" homesteads, while perhaps not strictly accurate, are convenient and will, accordingly, be used throughout the following discussion.

1. Homestead in a city, town or village

An "urban" style homestead is defined as follows:

(i) a dwelling house in a city, town, or village, occupied by the owner thereof and his wife as their home, and the lands and premises appurtenant thereto, consisting of not more than six lots or one block (where the block is not subdivided into lots) as shown on a plan duly registered in the proper land titles office, or registry office, and not more than one acre where the land is described otherwise than by registered plan;

This definition has been the subject of extensive judicial inquiry and discussion. Two preliminary points which we have observed should be noted. First, one of the governing principles that emerges and one which the courts have applied fairly consistently is that the provisions of "The Dower Act" should be given a broad and liberal construction and interpretation. With respect to the definition of homestead in particular, the following passage of Molloy, C.C.J. which appears in the case of Re Rodick aptly reflects this principle:

> I can think of few things better calculated to defeat the objects of The Dower Act, and the intention of the legislature in passing it, than a narrow and restricted interpretation of the essential word "homestead".[256]

Second, the general tenor of recent judicial opinion appears to reflect a greater willingness on the part of the courts to hold property to be a homestead.

In the vast majority of cases there is no uncertainty or trouble in identifying the homestead premises; ordinarily, it would encompass the house in which the spouses live and any garage, garden or yard which is used in connection with the property. Apparently, it is not necessary that a permanent dwelling house be erected for the actual occupation by the spouses;

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[256] Re Rodick, supra n. 244.

"a boxcar or tent may be sufficient".[257] There is no prerequisite that the claimant of a homestead show that it is devoted to the shelter of a family;[258] the requirement is one of actual occupation by both spouses in the property.[259]

Difficult issues, both of policy and of practice, have arisen, however, where part of the home or property adjacent to the home is used for purposes other than residential. That is to say, for example, where the home embraces property which is comprised of a retail grocery store with an attached residence or a family-operated restaurant, wherein a portion of which the proprietor and his wife live.

Generally speaking, it would appear that when considering multiple use property, the courts have tended to look to the chief use or primary function of the building.[260] If the principal function of the building is as a commercial venture rather than a residence, the courts have held that the property is not a homestead.[261] Where the primary use of the land is as a home, it is ordinarily immaterial that a portion is used incidentally for other purposes.[262] This is, of course, an objective test. The prevailing policy is best expressed by Maybank J. in Randall v. National Trust Co. Ltd., where he found that the use of part of the premises as rental accommodation did not destroy its residential character.

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[257] See dicta of Donovan J. in In Re Badner, [1941] 3 W.W.R. 730 at 733 (Man. K.B.).

[258] In Re Rodick, supra n. 256 the court refused to accept the argument that a homestead should be restricted to a home which has been occupied by a family rather than by a husband and wife alone.

[259] The words "and his wife" were added in 1964 after it had earlier been held in Re Rodick, supra n. 256 that a house owned and occupied by a married person, even though never lived in by the spouse, was a homestead within the meaning of the Act.

[260] Generally speaking, this same approach also appears to have been adopted in Saskatchewan, Alberta and British Columbia. In fact, in many respects, the cases reflect a greater willingness to hold property to be the homestead in order to invoke the homestead exemptions. See, for example, Re Skeele, [1923] 1 W.W.R. 117 (Sask. K.B.) where a building with a store below and living quarters above constituted the homestead; Scott and Sheppard v. Miller, [1922] 1 W.W.R. 1083 (Sask. C.A.); Urzada v. Urzada (1951), 1 W.W.R. (N.S.) 717 (Sask. K.B.) where the court found that it is a straining of not only the definition of "homestead" in the Act, but also of the purpose of the Act to attach dower to a building which is primarily used for commercial purposes. The disputed property consisted of a chicken hatchery and in a small part of which the married couple resided; Re Cherniak, [1930] 1 W.W.R. 676 affirmed 25 Alta. L.R. 44 (C.A.), Smith v, Smith (1951), 1 W.W.R. (N.S.). 492 (Alta. S.C.). Price v. Price, [1949] 2 W.W.R. 506 (B.C.S.C.); Read v. Read (also sub nom. In re Wife's Protection Act), [1950] 2 W.W.R. 812 (B.C.C.A.)

> To hold that use of a part of a home for roomers destroys its character as a homestead is inconsistent with all our thinking upon the subject of dower. Thousands of homes are purchased by their owners for homes in every sense of the word and used as such, but a part of them, sometimes a large part, is rented out to augment the owner's incomes. Mainly such places are still the homes of their owners. That is their primary function and it is immaterial what proportion of them is used for roomers and what proportion for the owner's homes.[263]

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[261] A leading case decided by our Court of Appeal in 1929 is In Re Ripstein Estate (1929), 38 Man. R. 184 (C.A.). There the trustees of the deceased property owner's estate asked the court to determine whether an entire building containing six stores and six or seven suites of apartments (one of which was occupied by the deceased) was a homestead within the meaning of the Act or whether simply the upstairs suite in which the deceased and his wife lived constituted the "homestead". The court held that neither was a homestead.

See also In Re Barrie, [1945] 2 W.W.R. 384 (Man. K.B.); and see Ironsides v. Green, [1927] 2 W.W.R. 59 (Man. K.B.).

[262] See, for example, In Re Ostapowicz Estate (1938), 46 Man. R. 65 (C.A.). where a one-storey building, in the front of which was a small grocery shop and the remainder of which consisted of four rooms wherein the proprietor and his wife lived, the two sections being connected by a door, was held to be a "dwelling house" within the definition of homestead in "The Dower Act".

[263] (1954), 11 W.W.R. (N.S.) 385 (Man. Q.B.). And see Monnin J. (as he then was) in Packer v. Packer (1959), 31 W.W.R. 22 (Man. Q.B.); In Re Seroy (1964), 50 W.W.R. 65 (Man. C.A.).

Similarly, it would seem that professional and family businesses, which are commonly operated by small entrepreneurs and physically located on the property, do not impair the residential character of the property.[264] One of the key elements appears to be the expanse of the business. Where the business is an extensive enterprise, it is likely the building will be found to be predominantly of a commercial character such that no homestead protections would arise.[265]

(a) Conclusion respecting multiple-use property

It is the Commission's view that the present urban definition has been clarified over the years by judicial interpretation which has afforded a good measure of certainty in ascertaining whether a particular dwelling house constitutes a homestead. The primary purpose test has effected a result which, to us, seems right in principle: namely, that premises wherein the further use is truly ancillary to the home should properly be included within the scope of the homestead definition. Of course, whether or not property is used primarily for business purposes or as a residential home is clearly dependent on the facts, which will be different in each case. The Commission acknowledges that there may be some difficulty in applying this test to particular facts. But we do not think we can improve upon the test itself nor do we think that the key words "dwelling house" are capable of specific statutory definition. In our estimation, it is unlikely that practical problems will arise in more than a small number of cases.

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[264] Many small family enterprises, particulary service businesses, are carried on from their owner's residence without in any way destroying the residential character of the property. See In Re Empey, [1979] 2 W.W.R. 559 (Man. Surr. Ct.); In Re Davidson Application (1953), 11 W.W.R. (N.S.) 236 (Man. Q.B.) where the property in question was found to be a homestead and was comprised of a building containing about 1,645 square feet of floor space, divided for use as a small restaurant in its front part and dwelling quarters in the rear; In Re Badner, [1941] 3 W.W.R. 730 (Man. K.B.), where it was found that a lot on which had been erected a dwelling house and subsequently other buildings, including a store, constituted the homestead.

[265] Consider, for example, an architect who practises in a small way from home; the mere fact that one or two rooms are set aside exclusively for the practice will not likely take the home outside the definition. The position would, however, be different if the spouse in question owned a very large architectural practice which occupied the whole of a commercial building save only for a few rooms at the top in which he made his home.

There is one further point which the Commission has considered. That is, whether the surviving spouse should be granted a life estate in a suite occupied by the spouses as their home, but which suite is part of a larger apartment complex owned by the deceased.[266] This is, in essence, part of a much larger question as to whether the surviving spouse ought to be entitled to sever the "non-home part" from the "home part" in order to invoke a life estate in a portion of primarily commercial premises. We have come to the conclusion that we cannot do so.

Such a scheme might have much to commend it if it could be made to work effectively and to produce a result which, on balance, was both fair and certain. In the end, however, we fear that any scheme we might devise would not fulfil these criteria. Such a scheme would, of necessity, have to be very complex and would give rise to more difficulties than it solved. For example, where the home is an intrinsic part of a commercial venture, to sever the proprietary interests in the home from the rest of the business may adversely affect the marketability of the balance of the property in which the other beneficiaries may have an interest.[267] What of the case where the business portion could not readily be severed from the home part of the property? When, if ever, could the personal representative seek to sell the entire commercial premises where such a sale is alleged to be in the interest of a more expedient administration of the deceased's estate?[267a] These questions are not susceptible of easy solution.

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[266] In Re Ripstein Estate, supra n. 261. Mr. Justice Dennistoun stated that a perusal of the whole Act leads to the conclusion that when dower in a homestead is dealt with, it refers to an interest in land on which a dwelling house is situate. It could not therefore be said that an upstairs suite in an apartment block was a dwelling house with land appurtenant thereto.

More importantly, if the "home part" of primarily commercial premises were to be viewed as a homestead, the owner's freedom of disposition of the entire commercial venture without the consent of his/her spouse would be fettered. It is not part of our intention to thrust one spouse into the business or commercial activities of the other. The Commission has concluded that this would go beyond the scope of the homestead protections and would be a straining of the purposes of the legislation.

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[267] Consider the case of In Re Tarnopolski (1944) 52 Man. R. 238 (K.B.). Here, the widow claimed a life interest in a parcel of land on which had been built a dwelling house owned by the deceased and on a part of which he previously had erected a movie theatre. The court found that the widow was entitled to a life estate in the homestead which encompassed the dwelling property, consisting of the house and that vacant part of the land of the husband which lay to the west of the wall of the theatre and surrounding the house on three sides.

Having determined that the life estate was restricted to the dwelling portion of the premises, difficulties arose respecting the viable operation of the movie theatre business. For practical purposes it was not found feasible to partition the premises under the Law of Property Act and it was noted that a sale of the building in its entirety would bring in more than a sale of the two portions separately. Hence, an order for sale of the whole property issued subject to the right of the widow to payment from the proceeds of the value of her life estate in the dwelling.

[267a] In Re Chupryk (1980), 110 D.L.R. 108 at 123 (Man. C.A.). Matas, J.A. points out that "it would be a rare case where a life tenant would be compelled to suffer partition or sale against his wishes".

We now summarize our views. On balance, we think that the definition of the urban home for purposes of the homestead protections should be defined in the same general terms as are presently set forth in clause 2(e)(i) of "The Dower Act", with but a few modifications. In particular, we wish to make it clear that condominium units should properly be encompassed within the homestead definition. While the decision in Re Ripstein might be construed to suggest that these cannot constitute a homestead, we can see no reason for excluding "freehold apartments" from the ambit of the homestead provisions. In addition, as land is the essential characteristic of the homestead, we have amended the definition to reflect this factor better. Finally, we have removed the clause "lands and premises appurtenant thereto" in light of the difficulties which it has posed. We set forth these difficulties at p. 180 when we consider the rural definition. Accordingly, we recommend:

RECOMMENDATION 70

That the homestead be defined, in part, to mean:

The land on which a dwelling house in a city, town or village, occupied by the owner thereof, and the owner's spouse as their home is situated, consisting of not more than six lots or one block (where the block is not subdivided into lots) as shown on a plan duly registered in the proper land titles office or registry office, and not more than one acre where the land is described otherwise than by registered plan.

RECOMMENDATION 71

That homestead also include a unit and common interests, within the meaning of "The Condominium Act", where that unit is occupied by the owner thereof and the owner's spouse as their home.

2. Homestead outside a city, town or village

We turn now to explore the "rural" definition of homestead set forth under clause 2(e)(ii) of "The Dower Act". At the onset we should point out that this definition differs from that which was contained in The Dominion Lands Act.[268]

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[268] The Dominion Lands Act, S.C. 1883, c. 19, as am. by S.C. 1898. Under The Dominion Lands Act, homestead was the quarter section of public lands on which early settlers of Manitoba made entry and ultimately obtained title upon compliance with specified statutory provisions.

For purposes of "The Dower Act", a homestead outside a city, town or village is defined as follows:

> (ii) a dwelling house outside a city, town, or village, occupied by the owner thereof and his wife as their home, and the lands and premises appurtenant thereto, consisting of not more than three hundred and twenty acres; but where the lands and premises of the owner consist of three hundred and twenty acres not in a block, any part thereof in the same section or across a road or highway from that portion thereof on which the dwelling house is situated shall for the foregoing purposes be appurtenant to that portion; and if the lands and premises of the owner exceed three hundred and twenty acres in the same section the homestead shall be the one hundred and sixty acres on which the dwelling house is situated and such other one hundred and sixty acres, being a quarter-section, in that section as the owner designates;[269]

While it had generally been accepted that the rural homestead (by providing the surviving spouse with a life estate in up to 320 acres), permitted a much larger acreage than in the case of an urban homestead, the recent decision in Re Moreau Estate has suggested otherwise.[270] The court, in considering the meaning of the word "appurtenant" in the first clause of the definition, held that the homestead encompasses simply the dwelling house and that portion of the land which is necessarily connected with the use and enjoyment of the home.[271] The learned trial judge stated as follows:

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[269] In Alberta "homestead" means a parcel of land on which the dwelling house occupied by the owner of the parcel as his residence is situated, and that consists of not more than one quarter section of land other than land in a city, town or village. The Dower Act, R.S.A. 1980 c. D-38, s. 1(e)(ii)(b).

In Saskatchewan, the definition of homestead is set forth under The Exemptions Act, R.S.S. 1978 c. E-14, s. 10, and is defined as follows:

> "the homestead, provided it is not more than 160 acres; and if it is more the surplus may be sold subject to any lien or encumbrance thereon."

[270] (1983), 23 Man. R. (2d) 202 (Surr. Ct.) (also sub nom Moreau v. Regnier) reversed on another point 26 Man. R. (2d) 40 (C.A.), and refraining from consideration of the issue as to the scope of the homestead definition.

[271] In many respects, this approach is similar to that adopted under "The Marital Property Act" respecting farm property. This approach is set forth in greater detail at page 190.

> It is not how title to the land is held, or the configuration of the land which determines what is appurtenant to the dwelling house. The question is what use is made of the land and whether such use is connected with the use and enjoyment of the dwelling house. Land and premises so connected become appurtenant to the dwelling house. If, for example, the land were the site of the family garden, an outhouse, garage, or swimming pool, then the land would be incidental to, and part of the use and enjoyment of, the dwelling house, and therefore appurtenant to it. If, however, the land was used in a way unconnected with the dwelling house, it would not be appurtenant.

At the time of death, the deceased owned a quarter section of land under two titles. The bulk of the land had been leased to a neighbouring farmer.[272] Consequently, the survivor was entitled to a life estate in the smaller parcel of land where the family home was located, approximately some 15 acres. It could not be said that the land subject to the lease agreement was appurtenant to the dwelling house.[273]

This decision has sparked a great deal of interest and has served to highlight the lack of a uniform policy on the part of the legislature respecting the homestead insofar as it may be farm property. Consider the case of Re Barker Estate.[274] There, the surviving spouse sought to elect and was subsequently granted an estate for her natural life in all of the deceased owner's lands consisting of 320 acres which comprised two quarter sections located in different sections, with no common boundary but diagonally across from each other. The court did not have to consider the meaning of the word "appurtenant" in the first clause of the definition; the second clause governed. This clause of the rural definition appears to deem any portion of the land located in the same section as the dwelling house and any land situated across the road/highway (and according to In Re Barker Estate, whether diagonally or at right angles) to be appurtenant to the dwelling house, provided the lands and premises of the owner consist of 320 acres not in a block. Simply stated, the entire farm as a unit or as a single operation constituted the homestead, up to the statutory maximum. The question as to whether the surrounding lands were necessarily connected with the use and the enjoyment of the dwelling house would seem to have been immaterial because under the second clause such lands are deemed to be appurtenant to the dwelling house.

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[272] The land had been leased prior to the death of the husband and every year after the husband died, with the widow receiving the rents each year after the husband's death.

[273] Further support for the approach and interpretation adopted in Re Moreau may also be found in the case of Re Zarowiecki [1982], 4 W.W.R. 728 (Man. Surr. Ct.).

[274] (1946), 54 Man. R. 169 (Surr. Ct.).

Similarly, in accordance with the third clause of the pertinent definition, where the lands and premises of the owner exceed 320 acres in the same section, the homestead is comprised of the 160 acres upon which the dwelling house is situate and such other 160 acres (i.e., any other quarter section in the same section) as the owner shall so designate or choose.

(a) Conclusion - Disparity in the treatment of rural homesteads

The Commission is of the view that the present rural homestead definition does not adopt a uniform approach to farm property. The extent of the life estate will in many cases depend upon the fortuitous circumstances as to how title is held or the configuration of the land itself. In particular, when the total acreage of the owner consists of less than 320 acres such that the first clause of the definition governs, the restricted meaning of "appurtenant" appears to reduce substantially the lands encompassed within the homestead.[275] We can see no justification for treating these land holdings differently than larger parcels of land. We concur with the comments of Lindal, Surr. Ct. J. in Re Barker Estate, wherein he states that "there is no particular magic in the boundaries of a section of land so as to create special rights or possibilities of rights within those boundaries".[276]

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[275] It is difficult to envision any case where the maximum 320 acres could be described as incidental to and necessary for the use and enjoyment of the dwelling house.

[276] Supra n. 274.

There is a further and rather important concern. Where the homestead is carved out of a larger parcel of farm property which is held under one certificate of title, this would ordinarily be in conflict with the law which prohibits subdivision unless the approval of the appropriate planning authority is first obtained.[277] This issue did not arise in Re Moreau as the land had earlier been subdivided and was held under cover of two certificates of title.

No doubt the easiest way to remedy this concern would simply be to stipulate that the prohibition in subsection 60(1) of "The Planning Act" should not apply to the registration of a life estate in favour of the surviving spouse. However, such a provision could plainly undermine and thwart the intent adopted in the governing development plan or basic planning statement. There could well be cases where the creation of a disposable title in the smaller parcel of land on which the dwelling house is situated would derogate from the policy embodied in the planning legislation. That this would often be the result would give rise to unacceptable difficulties.

(b) The desired policy respecting rural homesteads

Having said this, it remains to determine what principal approach ought to be adopted concerning farm property. While fundamental to the concept of homestead is the preservation of the family home, it may well be that the present rural definition may, in some cases, secure not only a roof over the head of the survivor but also a means of obtaining, at least in part, a livelihood.[278] It is to be emphasized that for purposes of an allocation of property on death, the full value of the family farm, being a commercial asset, would ordinarily be included in the appropriate spouse's inventory of property and the survivor would be entitled to one-half of the shareable gain. Therefore, the policy we wish to embody by preserving the life estate in a rural homestead is not one of maintaining a continued livelihood for the survivor. Our aim is simply to secure the survivor's place of residence.

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[277] "The Planning Act", C.C.S.M. c. P80, s. 60(1) et seq. precludes the District Registrar from accepting for registration an instrument that may have the effect of subdividing a parcel unless the subdivision has been properly approved. In addition, no unregistered instrument that may have the effect of subdividing a parcel creates or conveys any interest in land unless the subdivision has been approved by the approving authority. The conveyance or transfer of a life estate in but 2 to 5 acres out of a much larger tract of land would be just such an instrument. We are advised by land title officials that even a caveat which attempts to set forth a life estate in but a portion of the property in question would be construed as an "instrument".

While the Commission has determined that the present rural definition is in need of reform, we have also concluded that there is no perfect solution to the definitional question. Bearing in mind the concern of the larger acreage afforded to the rural homestead and the intended purpose of simply preserving the family home for the survivor, we think that the rural homestead definition should be reduced to a maximum of one hundred and sixty acres or a quarter section. In the course of our informal discussions with a number of rural practitioners, we were advised that, among farmers, it is common to refer to the homestead, or the home place, "as the home quarter", being the land not exceeding a quarter section on which the home is situate. We have also observed that Alberta prescribes 160 acres to be the maximum acreage. The Commission believes that this total acreage would better serve the spirit and function of the homestead protections. We are also confident that this proposal would not run afoul of the design and intent embodied in planning legislation.[278a]

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[278] This might arise where the second and third clauses of the pertinent definition are applicable.

[278a] Subdivision approval is not required where each parcel resulting from the subdivision is 80 acres or more and either abuts on a highway or is being consolidated with an adjoining parcel of land which abuts on a highway. "The Planning Act", C.C.S.M. c. P80, s. 60(3)(a).

In order to provide a uniform approach to farm property, we have excluded any reference to the word "appurtenant". It is the Commission's view that the rural homestead should encompass not only the dwelling house but also the surrounding lands, which are occupied, cultivated or operated in connection therewith as a single plot or farming unit, up to the extent of 160 acres or a quarter section. Where the lands of the owner are not in a block but rather held as adjoining or contiguous tracts the approach adopted in Re Barker Estate[279] would continue.

There may be some question as to the claim of homestead where the dwelling house, the auxiliary buildings and the garden are in the centre of a section or half-section of land. Should the lands of the owner exceed 160 acres in the same section, we think that the designation of what portion of the land constitutes the homestead should be made by the owner or personal representative of the deceased owner. The homestead would be that portion of the land on which the dwelling house is situated and such other lands in the same section as the owner or personal representative so designates, up to 160 acres or a quarter section.

There is one further point worth noting. Our attention has been drawn to the fact that a life estate for the benefit of the surviving spouse in a quarter section has the potential to affect adversely the management of a large farming operation encompassing a number of quarter sections. For example, the farm buildings (i.e., granaries, machine shed, etc.) are ordinarily located near the dwelling house and those who are carrying on the farming operation on the balance of the deceased's lands (normally children) will require the consent of the surviving spouse in order to gain access to these lands. This consent might be difficult to obtain where there is a great deal of hostility between the surviving spouse and children.

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[279] Supra n. 274.

While this may appear to be a difficult issue in theory, the Commission is of the view that it is one which in practice seems to give rise to comparatively little trouble in this jurisdiction. This same concern may be voiced respecting the present definition, but we are unaware of any case in Manitoba where the management of a family business has been adversely affected by virtue of the survivor's life estate. Accordingly, we recommend:

RECOMMENDATION 72

That homestead be defined, in part, to mean:

The land on which a dwelling house outside a city, town or village, occupied by the owner thereof and the owner's spouse as their home, is situated, consisting of not more than one hundred and sixty acres, or a quarter section; but where the land and premises of the owner are not in a block, any part thereof in the same section or across a road or highway from that portion thereof on which the dwelling house is situated shall constitute the homestead, but shall consist of not more than one hundred and sixty acres or a quarter section; and if the lands of the owner exceed one hundred and sixty acres in the same section, the homestead shall constitute that portion of the land on which the dwelling house is situated and such other lands in that section as the owner or the owner's personal representative so designates, to the extent of one hundred and sixty acres or a quarter section.

3. The requisite property interest

A further question which should be addressed under this heading is the requisite ownership interest that a spouse must have in the property before it can be termed a homestead. There is a paucity of authority as to the meaning of "owner" as it is used in the definition of homestead. "The Dower Act" does not define the term "owner" and its meaning must be derived from the context of the section, having regard to the purpose and intent of the legislation.

The few cases which have considered the issue are inconclusive as to the nature of the interest required. It is clear that the word "owner" includes an estate in fee simple, already acquired, or in the case of an agreement for sale, to be acquired upon payment of the purchase price.[280] Beyond that, it is an open question as to whether the word owner is limited to absolute ownership in fee simple.[281] It remains to be resolved, for example, whether the surviving spouse would be entitled to an estate for his/her natural life in the unexpired term of leasehold premises.[282] That being said, it must be noted that the spouse's right in the homestead can be no greater than the owner's estate in the property. Hence, a life estate in the leasehold premises would have to be defeasible on cessation of the term of the lease.

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[280] In Re Brereton, [1945] 3 W.W.R. 24 (Man. Co. Ct.). It would follow then that the spouse need not be the registered owner of the property in question; see Novasad v. Novasad, Freedman, C.J.M. Man. C.A., unreported, June 21, 1978.

[281] In Re Brereton, ibid. held that the term "owner" was restricted to an estate in fee simple. Consequently, the homestead protections did not embrace property in which the spouse had simply a life estate. But see Menrad v. Blowers (1982), 16 Man. R. (2d) 288 at 295 (Surr. Ct.) where Morse J. stated:

> To interpret the word "owner" as meaning only absolute owership would not serve to attain such objects [referring to the objects of The Dower Act].

[282] In Re Brereton, supra n. 280, Lindal C.C.J. stated, by way of obiter dicta, that the ownership interest as a lessee under a long-term lease is somewhat analogous to the case of a common law estate per autre vie and that the common law rule should apply where the owner dies before the lease expires. Simply stated, in his view, the survivor would not be entitled to a life estate in the portion of the lease still remaining. On the other hand, Morse J. in Menrad v. Blowers, supra n. 281 appeared to adopt the following passage found in 29 Corpus Juris, at p. 842, where it is stated:

> Title in fee is not essential to the acquisition of a homestead exemption. A homestead right may be acquired in land in which claimant has a life estate, or in which he has a leasehold interest. While ordinarily it is essential that there should be at least a sufficient right to justify occupancy, a perfect and complete legal title is not necessary. . . . (emphasis added)

For the sake of completeness, one further case requires mention. In the case of Wimmer v. Wimmer[283] it was held that where title to land is held by the spouses as joint tenants or as tenants in common such land properly constituted the homestead. This decision would appear to pose a number of thorny questions when homestead property is held as a joint estate by a married person together with another who is not the spouse of that married person.[284] Consider the following example. Two brothers own Blackacre in fee simple as tenants in common and one brother lives on the property with his wife and family. On his death, could his wife assert a life estate in Blackacre, given the ruling in Wimmer v. Wimmer? What if title to the property were held as joint tenants and not as tenants in common? Would the right of survivorship vest the whole property in the surviving brother free of the claim of the wife to a life estate? We are unaware of any Manitoba decision which has considered these questions.

As the relevant ownership interest is fundamental to determining whether the homestead protections arise, the Commission is of the view that it calls for some legislative clarification. First, we think that the homestead should embrace land, whether freehold or leasehold, provided that in the case of leasehold premises the term of the lease is in excess of three years.[285] Our intent is simply to include homes that are subject to long-term leasehold interests. We are not here referring to a suite in an apartment block but rather to a dwelling house that is primarily residential and which would otherwise constitute the homestead but for the fact that the estate is not a fee simple, but rather a leasehold interest. Of course, the survivor's rights could not be of longer duration than the estate owned by the deceased, and the expiration of the estate would terminate the survivor's interest.

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[283] [1947] 2 W.W.R. 249 (Man C.A.).

[284] We have been advised, however, by land titles officials that either the written consent of the spouse must be filed or a dower affidavit furnished where a co-tenant attempts to effect any disposition of such property.

[285] A homestead may then be claimed in a home owned by the claimant but located on leased land, as may occur, for example, with a trailer or vehicle commonly referred to as a mobile home.

Second, we would exclude the application of the homestead protections in any joint estate in land which is held by a married person together with another person or persons other than the spouse of that married person. We can see no basis for permitting a spouse to assert a homestead claim in such premises as it may operate to the prejudice of the co-tenant and deprive the co-tenant of the enjoyment of the property. This same approach has been adopted in Alberta.[286] Accordingly, we recommend:

RECOMMENDATION 73

That for purposes of the homestead definition, owner includes a spouse who is a lessee of lands and premises for a term in excess of three years.

RECOMMENDATION 74

That where a spouse is a joint tenant or tenant in common with a person or persons other than his/her spouse, that land should not be a homestead nor should the spouse have any statutory entitlement to a life estate in such land.

4. Consideration of the "marital home" definition

Before leaving the question of the homestead definition, we should point out that the Commission has considered whether the definition of homestead should be amended to bear the same meaning as the term "marital home" which is set out in paragraph 1(e) of "The Marital Property Act". It reads as follows:

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[286] On the other hand, in Saskatchewan, the fact that another person owns part of the whole interest would not appear to take the land out of the provisions of The Homesteads Act. See Toth v. Kancz (1975), 54 D.L.R. (3d) 144 (Sask. Q.B.); McDougall v. McDougall, [1919] 2 W.W.R. 637 at 642 (Sask. K.B.).

> "marital home" means property in which a spouse has an interest and that is or has been occupied by the spouses as their family residence and, where the property that includes the family residence is normally used for a purpose other than residential only, includes only the portion of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence, and where the property is owned by a corporation in which a spouse owns shares that entitles the spouse to occupy the property that spouse has an interest in the property; (emphasis added)

This definition was considered by Hamilton J. (as he then was) in Marks v. Marks in the context of farm property:

> With respect to a farm residence, I would think a reasonable yard and land for a vegetable garden would be necessary to the use and enjoyment of the residence. The amount of land to be included might depend on the location of the residence on the land and its access to public roads. Whether other buildings are directly associated with the use of the residence, such as a garage, would have to be determined on the facts of each case.[286a]

It is readily apparent that the definition of "marital home" under "The Marital Property Act" differs from the definition of "homestead" under "The Dower Act". While the distinction between the two definitions is significant, it is not surprising for the two Acts have very different purposes. We are not aware of any specific difficulties encountered or envisaged by the retention of these two definitions. Rather, in the interests of integrating the two schemes we considered whether it might be desirable to have one comprehensive definition of the home for purposes of the homestead protections and for those rights set forth under "The Marital Property Act". The conclusion we have drawn is that this would raise difficulties of some magnitude both in terms of general policy and concrete application in particular cases.

[286a] (1982), 17 Man. R. (2d) 209 at 217 (Q.B.) aff'd 22 Man. R. (2d) 300 (C.A.). This definition is employed for purposes of an allocation of property during the spouses' joint lives and for determining occupancy rights in the home.

In practical terms, given our present land registry system, there would appear to be virtually insurmountable difficulties in attempting to attach a life estate to only a portion of premises. Yet, the adoption of "The Marital Property Act" definition would do just that. It would exclude a life estate in any portion of the premises in a multiple-use dwelling which are let to others, or any part of the premises used mainly for or in connection with the business or profession of the owning spouse. Moreover, with respect to large parcels of farm property, if the life estate were to be restricted to the dwelling house and one or two contiguous acres, the difficulties noted earlier in regard to "The Planning Act" would be equally applicable.[287]

A further objection to the adoption of the definition under "The Marital Property Act" would lie in its lack of certainty and predictability. With the pertinent definition under "The Marital Property Act", it may not in many instances be entirely clear just what portion of the property constitutes the homestead. Hence, the spouse who desires to dispose of all or part of his/her lands may confront some difficulty in ascertaining whether the homestead protections apply to all or to only a portion of such lands. It is the view of the Commission that the homestead interest should be fixed and readily discernible.

Conceptually, the adoption of "The Marital Property Act" definition would seem inconsonant with the basic policy of the homestead legislation. In our estimation, "The Marital Property Act" definition would extend the homestead protections beyond their proper scope as this definition appears to encompass premises which are predominantly of a commercial character. While we consider the veto power of the non-owning spouse in greater detail later, for purposes of the present discussion, it may suffice to say that the consent of the non-owning spouse is required in order to dispose of the homestead.

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[287] See discussion at page 183.

Hence, the adoption of "The Marital Property Act" definition would provide the non-owning spouse with a life estate in a portion of commercial premises and a measure of control over the whole of commercial property. As stated earlier, it is no part of our intention to thrust one spouse into the business or commercial activities of the other. Hence, we do not recommend the adoption of "The Marital Property Act" definition for purposes of the homestead protections.

F. Rights in the Homestead During the Spouses' Joint Lives

What now follows is an in-depth examination of the statutory requirements governing the disposition of the homestead during the spouses' joint lives. In particular, we shall explore whether the policy of the Act to protect the non-owning spouse has been exploited to deny others their proprietary interests.

1. The requirement of consent

An integral part of the general scheme of "The Dower Act" is the provision whereby the owner spouse may not dispose of or otherwise deal with the homestead or any interest therein without the consent of the non-owning spouse.[288] This is sometimes characterized as a veto power in that the spouse can prevent the disposition of the homestead by withholding written consent.[288a] It would appear that this veto power does not, however, confer any vested interest in the homestead during the spouses' joint lives.[289] A comprehensive statutory definition of "disposition" is set forth in paragraph 2(c) which reads as follows:

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[288] "The Dower Act", C.C.S.M. c. D100, s. 3(1). There are a few instances, however, where this consent is not required, namely: (a) where the disposition is in favour of the non-owning spouse; (b) where the spouse has released in favour of the owning spouse all his/her rights in the homestead; and (c) where the property is owned by the husband and wife as joint tenants, an additional signature by way of consent is not necessary since both must sign as vendors.

[288a] There are but two grounds under section 13(1) upon which the non-owning spouse's consent may be dispensed with, namely (a) where the spouses have been living separate and apart for 6 months; or (b) where the spouse is a mentally disordered person.

> "disposition" includes every grant, transfer, sale, agreement of sale, grant of an option to purchase, mortgage (legal or equitable), encumbrance, charge, lien, lease for more than three years, and every other disposition of the homestead by Act inter vivos, and every devise or other disposition thereof made by will; but does not include a registered certificate of judgment within the meaning of The Judgments Act, or the lien or charge on lands created by the recording or registration of a certificate of judgment; or a lease made for a period not exceeding three years, or a lien under The Mechanics' Lien Act or The Builders' Liens Act;

Section 3 provides that any disposition of the homestead requires the written consent of the non-owning spouse, without which the purported disposition "shall be invalid and ineffective". This section is, however, subject to a number of saving sections or curative provisions which endeavour to protect third parties. We shall consider these curative provisions in turn.[290]

Simply stated, the formalities laid down in the Act must be strictly complied with. The spouse's written consent is an absolute requisite to the disposition; a willingness to consent is of no effect until such consent is evidenced in writing.[291] This written consent must be in the prescribed form set out in the statute or may be "to the like effect".[292] It has been held that the non-owning spouse's execution of an acceptance, under an agreement for sale, as if she were one of the vendors, does not constitute a consent "to the like effect" as contemplated under the Act.[293]

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[289] Mennig v. St. Andrews R.M. (1952), 4 W.W.R. (N.S.) 427 (Man. K.B.). The spouse can, however, file a caveat "claiming an interest in the land" in accordance with section 27 of "The Dower Act" which caveat prevents the registrar from registering a disposition.

[290] The two main curative provisions are set forth in subsections 8(4) and 8(7) of "The Dower Act".

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[291] *Wall* v. *Dyck*, [1950] 1 W.W.R. 699 (Man. C.A.).; *Rose* v. *Dever*, [1972] 2 W.W.R. 431 (Man. C.A.), the complete judgment of which the Supreme Court affirmed [1973] 6 W.W.R. 672 (S.C.C.).

In Saskatchewan, it would appear that the courts, in interpreting the provisions of its *Homestead Act*, have refused to allow non-compliance with the formalities required by the Act to invalidate a contract to which the wife had consented freely, knowing her rights, and without compulsion on the part of her husband. *see* *Suppes* v. *Wellings* [1982] 4 W.W.R. 106 (Sask. Q.B.).; *McClenaghan* v. *Haley* (1983), 148 D.L.R. (3d) 577 (Sask. C.A.); *Toronto-Dominion Bank* v. *Gordon*, [1981] 5 W.W.R. 235 (Sask. C.A.). In each of these cases, the spouse whose consent was required, had evidenced a written consent to the proposed disposition but not in the form required by the Act.

In Alberta, it had been held that the signature of the non-owning spouse as an acceptance of an agreement for sale could not constitute consent in the form prescribed by the Act. *See* *McColm* v. *Belter* [1975], 1 W.W.R. 364 at 367 (Alta. C.A.). However, in the recent case of *Gibraltar Mortgage Corporation Ltd. and Co-Operative Trust Co. of Canada* v. *Korner* (1983), 45 A.R. 14 (Q.B.) it was held that where a spouse's consent to disposition of a homestead may be otherwise proven, the spouse's failure to sign either the consent or the certificate of acknowledgment required by the Act does not invalidate the disposition provided that the spouse had full knowledge of his/her dower rights.

[292] "The Dower Act", C.C.S.M. c. D100, s. 5(2). The prescribed form is set forth as Forms A or Form B in the scheduled attached to the Act.

[293] *See* *Westward Farms Ltd.* v. *Cadieux* (1982), 16 Man. R. (2d) 219 (C.A.).; *Gronbach* v. *Petty* (1952), 5 W.W.R. (N.S.) 68 revd., on another point [1953] 1 S.C.R. 207 where Adamson J.A. held that the consent had to be explicit and unequivocal and that the husband's signature on the agreement for sale did not qualify. On the other hand, in *Vandermeulen* v. *Wieler*, *infra* n. 304 Kroft J. found that a disposition was consented to in writing by the wife when she signed the acceptance.

However, we have observed that section 12 of "The Dower Act" does offer some relief where there is an irregularity in the form of or proof of written consent. The court is permitted to validate the otherwise defective execution of consent where it lacks some formality. We think it fair to characterize this as a rather limited curative provision in that it requires some written execution of consent; it would provide no relief where the non-owning spouse approved and agreed to the disposition but failed to furnish a written consent. In order for the disposition to be effectual, the Act further stipulates that the written consent must be filed in the land titles office.[294]

2. The Certificate of Acknowledgment

This requirement of written consent does not end the formality. Where the disposition is effected by the husband, the wife must "acknowledge apart from her husband" that the consent was:

(1) voluntarily executed by her of her own free will and accord and without any compulsion on the part of her husband, and

(2) that she is aware of the nature and effect of the consent".[295]

The certificate of acknowledgment is also required in the case of a wife who releases, in favour of her husband, all her rights under "The Dower Act". This acknowledgment must be made before a person authorized by "The Manitoba Evidence Act" to take affidavits, and such person must sign a completed

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[294] It is further provided that such consent may be embodied in or endorsed on another document or may be a separate document provided that in each case the consent sufficiently identifies the lands and premises. Once the consent has been given in writing in the form prescribed by the Act, no further consent or proof is necessary. "The Dower Act", C.C.S.M. c. D100, s. 26(1) and 26(2).

[295] "The Dower Act", C.C.S.M. c. D100, s. 8(1).

"certificate of acknowledgment"[296] which is to be attached to the required consent.[297] A broad spectrum of persons are permitted to administer affidavits within the province.[298] Where the wife is the owner of the homestead and wishes to effect a disposition, there is a historical curiosity respecting the requirement of an acknowledgment. While the husband's written consent is mandated, a certificate of acknowledgment is not required in such a case.[299]

There would appear to be much uncertainty and confusion surrounding the precise nature or role of an acknowledgment. In particular, the question has arisen as to whether rigid compliance with the acknowledgment requirement is necessary in order to validate a written consent otherwise made in conformity to the Act. In construing the Alberta counterpart to our "Dower Act", it was held by the Supreme Court of Canada in the case of Senstad v. Makus[300] that the absence of a written acknowledgment does not render ineffective a disposition of the homestead where written consent has otherwise been furnished in accordance with "The Dower Act" and the spouse has not attacked the validity of the consent. As to the purpose of the acknowledgment provisions, Martland J. stated as follows:

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[296] This form certificate of acknowledgment is set out in Appendix F to the Act.

[297] In the case of a disposition of minerals, the acknowledgment must be taken before a barrister-at-law. "The Dower Act", C.C.S.M. c. D100, s. 9(1) and (2).

[298] "The Manitoba Evidence Act", C.C.S.M. c. E150, s. 62(1).

[299] "The Dower Act", C.C.S.M. c. D100, s. 33(1).

[300] (1977) 79 D.L.R. (3d) 321 (S.C.C.). The defendant vendor agreed to sell homestead property to the plaintiff purchaser and the vendor's wife executed a consent which was substantially in the form as set out in section 5 of The Dower Act, R.S.A. 1970, c. 114, but the wife failed to acknowledge her consent as required by section 6 of the Act. The vendor sought to withdraw from the agreement on the basis that his wife had not complied with the provisions of The Dower Act. The court held that a written consent is prima facie valid. This case has been adopted and followed with approval in the Saskatchewan case of Suppes v. Wellings, supra n. 291. And see McFarland v. Hauser (1978), 88 D.L.R. (3d) 449 (S.C.C.).

> In my opinion the purpose of the requirement of acknowledgment in the present Act is to prevent the spouse from challenging the validity of his or her consent. If a disposition of the homestead is made carrying the written consent of the spouse but there is no acknowledgment, or an improper acknowledgment, the validity of the consent and therefore of the disposition is open to attack on the ground that the spouse was not aware of the nature of the disposition, was not aware of the dower rights conferred by the Act, did not appreciate the effect of the consent, or did not give a free and voluntary consent without compulsion. The written consent is *prima facie* valid, but it may be attacked on any of these grounds if there is not a s. 6 acknowledgment.[301]

At trial, in Westward Farms Ltd. v. Cadieux[302] Wright J. adopted this view and held that it was equally applicable to the Manitoba "Dower Act". On appeal, this decision was reversed, on another ground, and the court refrained from consideration of this issue.[303] Certainly the tenor of earlier Manitoba decisions would suggest that in order for there to be an effective consent there must be strict compliance with both the requirement of written consent and an acknowledgment, in the case of the wife.[304] Hence, the precise role of an acknowledgment in Manitoba remains a quandary.

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[301] Id. at 331-332.

[302] (1981), 9 Man. R. (2d) 96 at 107 (Q.B.).

[303] Supra n. 293 at 230. Matas J. did caution that care must be exercised in applying decisions from Alberta to Manitoba because of the differences in legislative history and the differences in the wording of the statutes.

[304] See, for example, Vandermeulen v. Wieler, [1980] 4 W.W.R. 164 (Man. Q.B.); Brown v. Prairie Leaseholds Limited (1954), 62 Man. R. 253, aff'd without written reasons by the Manitoba Court of Appeal at 276, leave to appeal to Supreme Court of Canada refused (1954) 13 W.W.R. 40. This pre-dates the Supreme Court of Canada decision in the Senstad case and suggests that the acknowledgment required under s. 8(1) of "The Dower Act" is mandatory and must be observed fully and without deviation. In particular, the phrase "apart from her husband" was held to mean physically separated from the husband such that he cannot see or hear anything that might be occurring.

(a) Role of Certificate of Acknowledgment as a curative provision

Once this certificate of acknowledgment has been duly signed by an authorized person, it plays a key role in restricting the non-consenting spouse's right in regard to the homestead. Subsection 8(4) of "The Dower Act" provides that a certificate of acknowledgment is conclusive proof of the truth of the statements therein contained, except as against any person who had actual knowledge of the untruth of any statement at the time when any alleged interest in the homestead was acquired.[305] In short, it is a curative provision which strives to protect a third party. The full effect of this conclusive proof is that the wife must be taken to have appeared and stated to the officer, duly authorized for that purpose, that she executed the consent and, so far as a third party is concerned, she is barred by it and precluded from denying it. Evidence that the spouse did not in fact consent (e.g. it was forged) or that the spouse did not execute the consent freely and voluntarily without any compulsion on the part of the husband, or that the spouse did not understand the nature and effect of the disposition is inadmissible in an action against the third party who has acquired any interest in the homestead.[306]

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[305] Brown v. Prairie Leaseholds Limited, ibid., where a purchaser uses its agent as a commissioner to take acknowledgments then his knowledge of the untruth of a statement in an acknowledgment will be attributed to the principal.

[306] see, for example, Chudyj v. Can. Permanet Mtge. 1937 45 Man. R. 164 at 193 (C.A.) where Richards J.A. in commenting upon this curative provision states:

> It should be borne in mind that there was no provision for dower in Manitoba prior to 1918, and that, when the legislation was introduced, the dangers and troubles of it were considered. The Legislature then clearly endeavoured to protect innocent purchasers. In doing so it provided drastic safeguards. The protection given bona fide transactions by The Dower Act is, in some respects, much greater than is given by The Real Property Act, 19344, ch. 38, which does not protect persons who rely on instruments which are discovered later to be forgeries. And see Young v. Kinnis (1953), 61 Man. R. 374 (Q.B.).

3. Registration Requirements for Land Titles Office; Dower Affidait as a Curative Provision

Where a person attempts to register a disposition of land that does not purport to be consented to under "The Dower Act", the district registrar of land titles requires an affidavit of the owner in the prescribed form stating that (s)he is not married, or that the land or any part thereof is not the homestead.[307] These affidavits are printed on both the standard forms for a transfer of land and mortgage. The spouse simply completes the appropriate paragraphs. Similarly, where the spouse is a co-owner and joins in the instrument, each spouse takes an affidavit that his/her co-tranferor, or co-mortgagor, as the case may be, is his/her spouse. In addition, there is the requirement that where the non-owning spouse's consent is necessary, the owner spouse must take an affidavit that the consenting person is, in fact, his/her spouse.

Like the certificate of acknowledgment, where proof has been taken by affidavit, both a third party, who has acquired any interest in land, and the district registrar are entitled to rely on the affidavit of the owner, regardless of the veracity of its contents.[308] Generally speaking, neither is bound to make inquiry as to the truth of any of the matters therein alleged as fact.[309] There are but two exceptions to this general principle, namely, (1) where the person had actual knowledge[310] of the untruth of any of the matters or (2) where the transaction was tainted with fraud in which that person has participated or colluded.

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[307] "The Real Property Act", C.C.S.M. c. R30, s. 70(1). These affidavits are included as Forms G and H in the schedule to the Act.

[308] Reep v. Shuckett (1955), 15 W.W.R. 375 (Man. Q.B.). The husband, on executing an instrument disposing of the homestead, swore in an affidavit that he had no wife but there was no suggestion that the mortgagee knew otherwise. Sine the mortgagee was without knowledge of the truth, the case fell within the words "except as hereinafter otherwise provided" under section 3 of "The Dower Act" and the transaction stood.

[309] "The Dower Act", C.C.S.M. c. D100, s. 8(7).

[310] The knowledge of the falsity in the affidavit must be actual knowledge; constructive knowledge is not sufficient. See McKinnon v. Smith (1925), 35 Man. R. 209 (C.A.).

The apparent purpose of the provisions respecting a dower affidavit and certificate of acknowledgment is to bring the law as to dower into harmony with the basic principles of the Torrens System operative under "The Real Property Act". The main object of a Torrens System is to save persons dealing with the registered owner from the trouble and expense of going behind the register in order to investigate the history of the author's life and to satisfy themselves of its validity. That end is accomplished by providing that a bona fide third party may rely upon the dower affidavit and the certificate of acknowledgment, regardless of the truth of their contents. The legislature has attempted to balance the interests of wronged spouses and those of innocent third parties.

In practice, the third party need only satisfy himself that a written consent to the proposed disposition and a certificate of acknowledgment have been properly completed in the manner and form prescribed by the Act. Similarly, where it is alleged that no consent is required, a dower affidavit alone will protect the third party as the affidavit is determinative of the status of the property.

4. Proposals for Reform

Having reviewed the requirements under "The Dower Act", we are now in a position to point to those aspects of the Act which we consider to be in need of reform. Reference has earlier been made to the fact that the home is the shelter and focal point of the family, deserving of special treatment and status. To secure the spouse's entitlement to possession and enjoyment of the home and to protect the home from arbitrary disposition or encumbrance by one of the parties to a marriage, the Commission has concluded that the requirement of written consent by the non-owning spouse should be maintained. It is also the Commission's view that a prescribed form be provided in order to encourage certainty as to the written form of consent required.

The Commission's primary concern is that spouses should not relinquish rights in the homestead without giving an informed consent. To that end, the form itself and the "examination" required for purposes of completing the certificate of acknowledgment should properly inform a spouse; they ought not to be a mere formality. This is particularly so, bearing in mind the fact that once the certificate of acknowledgment has been duly signed by an authorized person so far as the non-owning wife is concerned, she is barred by it and precluded from denying it.

The case law does suggest, however, that on occasion those persons before whom an acknowledgment under "The Dower Act" must be taken, have been unfamiliar with the provisions of the Act and the required procedure. For example, in the Alberta case of Mott v. Prudential Insurance Company of America[311] the real estate agent before whom the consent was taken stated that he had never read The Dower Act. In the Chudyi case[312] a commissioner for oaths executed a certificate of acknowledgment, although he had not seen the illiterate woman sign by making her mark, relying on the assurance of her husband to whom the document had been forwarded for her signature, that the said mark was hers.

In light of this concern, the Commission considered whether the consent to a disposition of the homestead should be acknowledged only before a lawyer. While the objects of the Act would better be attained where the spouses' rights were fully explained by persons possessing a full and detailed knowledge of "The Dower Act", we fear that such a requirement might impose further hardship in terms of expense, delay and inconvenience in those regions of the province where ready access to a lawyer is simply not available.

The compromise solution which we propose is that the required examination and prescribed forms be amended so that from a reading of the appropriate form itself both the spouse and those called upon to administer the acknowledgment will understand and appreciate fully the homestead protections. It is hoped that this will enable those using the forms to know, without difficulty, the nature and effect of the instruments which they are executing.

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[311] [1939] 3 W.W.R. 602 at 604 (Alta. S.C.) (also sub nom Garrels v. Prudential Insurance Company of America. See also McFarland v. Hauser supra n. 300.

[312] Supra n. 306.

It would, of course, be necessary to ensure that any certificate of acknowledgment duly executed by an authorized person and any written consent executed in the proper form prior to the commencement of this proposal, would be accorded the same force and effect it would have been prior to the introduction of the new form. As well, those stationers which distribute the printed forms should be contacted with sufficient lead time in order that the printed forms may be amended accordingly.[313]

Furthermore, we can see no reason why a husband ought not to be fully advised of his rights in the homestead. We think that both husbands and wives alike should be required to undergo an examination for purposes of completing a certificate of acknowledgment whether for a consent to a disposition or for the general release of homestead rights.[313a]. Accordingly, we recommend:

RECOMMENDATION 75

That where a husband or wife executes a consent to a disposition or a release, (s)he should acknowledge apart from his/her spouse:

(i) that (s)he is aware of the nature and effect of the consent or release, as the case may be;

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[313] The standard real estate board "offer to purchase" relating to the sale of residential properties has had incorporated in it, for quite some years now, a printed clause setting forth the prescribed form consent. Similarly, standard form mortgages and transfers of land also incorporate this printed clause.

[313a] The prescribed forms set forth in Recommendation 76 refer to "The Homesteads Act" rather than "The Dower Act" as we recommend later that the name of the Act be changed to "The Homesteads Act".

(ii) that (s)he is aware of his/her entitlement to a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent;

(iii) that (s)he consents to the disposition or executes the release, as the case may be, for the purpose of giving up, to the extent necessary to give effect to the disposition or release, the life estate in the homestead;

(iv) that (s)he executes the document freely and voluntarily without any compulsion on the part of his/her spouse; and

(v) that, in the case of a release, (s)he has received valuable consideration for the giving of the release.

RECOMMENDATION 76

That the prescribed forms in regard to the consent and the certificate of acknowledgment be amended in a similar manner to the following:

(1) Consent to Disposition

I, ... being married to . . . . ., named in the (deed, transfer, mortgage, encumbrance, lease or as the case may be) consent to the disposition of our homestead, made in this instrument, and I have executed this document for the purpose of giving up my life estate in the property given to me by The Homesteads Act, to the extent necessary to give effect to the disposition.

Dated at . . . in the Province of . . . this day of 19 .

. . . .
(Signature of Spouse)

(2) Certificate of Acknowledgment

1 This document was acknowledged before me by . . . . apart from her husband (or his wife).

2 . . . . acknowledged to me that (s)he

(a) is aware of the nature and effect of the consent or release, as the case may be,

(b) is aware that The Homesteads Act gives her (or him) a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent,

(c) consents to the disposition or executes the release, as the case may be, for the purpose of giving up the life estate in the homestead given to her (or him) by The Homesteads Act, to the extent necessary to give effect to the said disposition or release,

(d) executes the document freely and voluntarily without any compulsion on the part of her husband (or his wife),

(e) in the case of a release, has received valuable consideration for the giving of the said release.

Dated at . . . in the Province of. . . this day of , 19 .

. . . .
(Title of officiating officer)

As to the precise purpose of a certificate of acknowledgment, it is our view that where a written consent is made in conformity to the Act, it should, prima facie, be valid as a consent, even if it has not been acknowledged.[314] The attached Act is drafted to effect this result, based upon The Dower Act of Alberta. Where the written consent is not accompanied by an acknowledgment, we think it should be open to that spouse to set aside the disposition on the grounds that (s)he did not in fact consent. Such grounds might include, inter alia, duress, unconscionability, undue influence and non est factum. We consider later the question as to what, if any, bearing, verbal assurances or a written representation evidencing a consent, but not made in conformity to the Act, should have on the issue of non-compliance.

Once obtained and duly signed by an authorized person, the certificate of acknowledgment should preclude a spouse from later challenging the validity of the consent. We think it of utmost importance that any interest acquired by a third party should remain impregnable against the non-owning spouse, where the third party has satisfied himself that both a written consent and acknowledgment in compliance with the full requirements of

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[314] This is the approach adopted by Mr. Justice Martland in Senstad v. Makus, supra n. 300.

"The Dower Act" have been properly executed or that a dower affidavit has been furnished. Quite simply stated, the present protections under "The Dower Act" which endeavour to safeguard the interests of a third party should be maintained.

There remains one minor proposal which we suggest with respect to the comprehensive definition of "disposition". For the sake of completeness, we think that the definition should be amended to encompass the grant of a right of first refusal to purchase, which was recently held to constitute a disposition.[315] Accordingly, we recommend:

RECOMMENDATION 77

That the definition of disposition be amended to include the grant of a right of first refusal to purchase.

5. Consequences of a Disposition Made in Contravention of the Statute

The most important and difficult question arising with respect to the veto power is what happens when the statutory requirements have not been complied with. From 1918 until today the courts and the legal profession have wrestled with questions such as the following: Can the prospective purchaser raise the fact of non-compliance in order to resile from the transaction? Can the spouse, who may have been responsible for the non-compliance, raise it to escape from the transaction? When, if ever, is the non-owning spouse estopped by reason of his/her conduct from averring that (s)he did not give the required consent? We shall examine briefly the case law from Manitoba to see how the courts have struggled with these thorny issues.

(a) Unsatisfactory state of present law

An early case on the effect of non-compliance is the decision of the

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[315] Westward Farms Ltd. v. Cadieux, supra n. 293 at 240, 246.

Manitoba Court of Appeal in Wall v. Dyck.[316] In this case a purchaser sought to withdraw from what he described as the "proposed sale" on the ground that the vendor's wife had failed to give a timely consent as required by the Act. There was no doubt that she was at all times ready and willing to consent to the sale; the delay in giving her written consent was characterized as mere inadvertence.[317] The court considered subsection 3(1) of "The Dower Act" and found itself bound by its express declaration which states that the agreement shall be "invalid and ineffective" unless the spouse consents in writing. Hence, it was held that the purchaser was entitled to raise the defective consent and to withdraw from the sale leaving the vendor without remedy.[318] Similarly, in Rose v. Dever[319] the prospective purchaser relied upon "The Dower Act" in order to withdraw from a contract for the sale of homestead property; the vendor's wife approved and assented to the sale but she too had failed to furnish her written consent. The ability of the purchaser to raise want of the required consent was not, however, without expressed regret from the Court of Appeal. Freedman C.J.M. stated:

> But if practical difficulties arise from the operation of a statute, the remedy is to change it. The court, however, must deal with the statute as it is, no matter if it sometimes produces consequences which the court itself may regret.[320] (emphasis added)

Regret was also expressed by the Court of Appeal in Westward Farms Ltd. v. Cadieux where Matas J.A. further commented:

> If it were felt that the policy of the Act to protect dower rights is being exploited to controvert other property interests, the remedy lies with a simple amendment to the legislation.[321]

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[316] Supra n. 291.

[317] In fact, the day after the vendor received notice that the purchaser was withdrawing from the deal, the vendor's wife gave her consent independently of her husband and in compliance with the Act.

[318] It would appear that the disposition may be validated by the non-owning spouse's subsequent consent, provided that the prospective purchaser has not withdrawn from the transaction in the interim.

[319] Supra n. 291.

[320] Id. at 439.

[321] Supra n. 293 at 230.

Prospective purchasers, however, have not been the only persons who have relied upon "The Dower Act", owners themselves have invoked "The Dower Act" in order to avoid specific performance of an agreement honestly made.[322] In the case of Vandermeulen v. Wieler[323] the court was faced with the situation where both the husband and wife purported to enter into an agreement for sale which, but for the absence of strict compliance with "The Dower Act", would have been enforceable. While the wife had been an informed and willing participant in the discussions and attached her signature to the acceptance, she had not completed the statutory acknowledgment. Accordingly, the vendors were permitted to resile from the transaction without penalty. Kroft J. in commenting upon the conduct of the vendors stated:

> While it cannot be said that their conduct was fraudulent, neither can it be regarded as justifiable in the ordinary sense of that word. The defendants abused the protection that the Dower Act provides.
>
> . . . .
>
> I would have granted relief to the plaintiff had I been able, but because of the operation of the Dower Act, I cannot.[324]

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[322] In referring to the number of Alberta cases invoking the Dower Act as a reason for refusal by the vendor to perform, McDermid J.A. in DeJong v. Gechter, [1976] 5 W.W.R. 739 at 748 (Alta. C.A.), rev'd [1977] 6 W.W.R. 192 (S.C.C.) stated:

> One is usually left with the feeling that the real reason is that on a rising market for real estate the vendor's wife with perhaps the encouragement of the vendor feels that a higher price may be obtained and that the vendor and his wife are 'welshing' on the deal . . . . The remedy for such actions however lies with the legislature and not the courts.

[323] Supra n. 304.

[324] supra n. 304 at 172.

As to whether a spouse could ever be estopped from raising the fact of non-compliance, we are unaware of any Manitoba case in which this doctrine has succeeded. Simply stated, estoppel by representation is the doctrine by which a person may be precluded by his conduct or act from asserting a right which he otherwise would have had.

An early case, Graham v. Hammil,[325] decided by the Court of Appeal, did suggest that this doctrine may be available.[326] At issue in this case was whether spouses, having borrowed a substantial sum of money at the wife's insistence, could avoid the payment of that sum by alleging that the wife had not consented to the loan in compliance with the Act. The court stated that to claim dower under the circumstances would amount to fraud as the wife initiated the transaction and clearly understood its nature. However, the case did not turn on "The Dower Act" provisions as the court found that the lot and building on which the mortgage was secured did not constitute the homestead of the parties.

In summary, "The Dower Act", while intended for the protection of spouses has on some occasions been used as a weapon for use against them. Similarly, in order to take advantage of their own default, some spouses have subverted the policy of the Act by using it to escape from an agreement. The Commission is of the view that legislative reform is necessary.

(b) Proposed solution

(i) Disposition voidable on application of non-consenting spouse

The fundamental problem to be addressed is that of balancing the spouse's interest of protecting the home and the interest of bona fide third parties who deal with the owner and acquire an alleged interest in the homestead. We are of the view that homestead protections should restrict contractual and other legal rights only to the extent that it is thought necessary to fulfil the objectives of "The Dower Act". This demands a more flexible solution to the cases of non-compliance. We now set forth our proposals.

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[325] [1926] 2 W.W.R. 15 (Man. C.A.).

[326] It would appear that the doctrine of estoppel received no recognition in the case of Vandermeulen v. Wieler, supra n. 304.

Broadly stated, it is our view that any disposition of the homestead which is made in contravention of the requirement of written consent should be voidable at the instance of the non-consenting spouse alone, upon application to the appropriate court. In our estimation, this approach would not put the prudent third party inordinately "at risk". Where (s)he has taken the precaution of ensuring that a certificate of acknowledgment has been duly completed or a dower affidavit properly executed, the third party should be entitled to rely upon these documents and the disposition would not be open to attack. In other words, our proposal would be subject to the curative sections now present under "The Dower Act".[327] Where, however, these precautions have not been taken and there has been no pretence of consent on the part of the spouse, the non-consenting spouse should prima facie, be entitled to set aside the disposition. We later examine in detail whether or not the spouse could ever be estopped by reason of his/her conduct from averring that (s)he did not furnish the required written consent.

We believe that this approach would not only enable the non-consenting spouse to avail himself/herself freely and adequately of the protection which "The Dower Act" intended to confer upon spouses, but it would also impair as little as possible the validity of "honest transactions". We concur with the comments of Mr. Justice Moore in the case of McFarland v. Hauser:

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[327] We consider later what other remedies ought to be available to the consenting spouse whose homestead rights have been extinguished through the operation of these curative provisions. For purposes of the present discussion, it is assumed that neither a certificate of acknowledgment has been executed nor a dower affidavit administered.

> The purpose of the Dower Act is to provide married persons some protection against the improvidence of their spouses and not to extend any rights to third parties. The Dower Act deals solely with husbands and wives in their relationships with each other and confers upon each party to a marriage limited rights with respect to the property of the other. It is my view that only a spouse may advance a claim that dower requirements have not been completed within the meaning of the statute.[328]

In short, prospective purchasers would be precluded from seeking cover under "The Dower Act" in an attempt to repudiate a transaction honestly made. Similarly, the owner-spouse could not benefit from his/her own wrongdoing; (s)he could not move to set aside the transaction by relying upon his/her own misfortune in failing to secure consent, where the non-consenting spouse does not join the owner and assert that right.

The application to set aside the disposition should be by way of originating notice of motion to ensure as expeditious a procedure as is possible. This right would, of course, be subject to the specific limitation periods set forth under "The Limitation of Actions Act".[329] In practice, though, we do not contemplate that such an application by the non-consenting spouse would generally be necessary. The requirements of the land titles office would ordinarily preclude the registration of the proposed disposition.

Consider, for example, a common disposition, namely an agreement for sale, which has been signed by the prospective purchaser and the owner but the written consent of the owner's spouse has not been secured. Assume further that the owner's spouse is unaware of the existence of the agreement for sale. On the closing of the transaction, if the spouse's written consent is not embodied on the Transfer of Land,[330] the only practical recourse of the purchaser is to demand the return of any deposit paid under the agreement for sale. It would be pointless for the purchaser to launch an action for specific performance or to attempt to recover damages, though, strictly speaking, the agreement for sale is valid until the non-consenting spouse moves to set the same aside. Having failed to ensure that the spouse's written consent accompanied the agreement for sale, the purchaser has put himself/herself "at risk". The non-consenting spouse, unaware of the contemplated disposition, would succeed in an application to set aside the disposition.

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[328] (1977), 2 Alta. L.R. (2d) 289 at 333 (C.A.).

[329] "The Limitations of Actions Act", C.C.S.M. c. L150, s. 60.

[330] It is also assumed that a dower affidavit does not accompany the Transfer of Land.

In our estimation, this approach would strike a fair balance between the interests of the non-consenting spouse and the interests of the third party. It would restrict contractual rights only to the extent which we think necessary in order to fulfil the objectives of "The Dower Act". We recommend:

RECOMMENDATION 78

That subject to recommendation 79, where the owner-spouse makes a disposition of any interest in the homestead without the written consent of his/her spouse in the prescribed form, the court should, on application by the non-consenting spouse, set aside the disposition, unless a certificate of acknowledgment has been duly signed by an authorized person or a dower affidavit properly executed.

(ii) Estoppel

On the question of non-compliance, we have, thus far, focused our attention on the spouse who has not furnished his/her written consent to a disposition in conformity to the Act and who has made no pretence of consent to the third party. We turn now to consider those cases where the spouse, through verbal assurances or written representations, has intended to induce the third party to believe that (s)he consents to the disposition of the homestead and the third party, on the faith of such representations, thereby alters his/her position to his/her detriment. In particular, we consider whether the third party should ever be entitled to invoke the common law doctrine of estoppel by representation as a defence to an application by the non-consenting spouse to set aside a disposition.

Consider the following example. The wife, eager to relocate, engages an agent to list the property for sale. She shows the home to the prospective purchasers and is an informed and active participant throughout the negotations. Although not one of the registered owners, she attaches her written signature to the acceptance of the offer to purchase. The purchasers enter into an agreement for sale of their present home in anticipation of their move and engage a moving company to transport their furniture. On possession date, the transaction is unable to close as the wife refuses to provide written consent in conformity to the Act. She has found a new purchaser who is willing to pay more for their home and the refusal to consent is motivated by the desire to secure a higher price. Should the wife be estopped from raising the fact of non-compliance with the strict formalities of the Act?

As we earlier observed, we are unaware of any Manitoba case where the doctrine of estoppel has been invoked in order to avoid non-compliance with "The Dower Act". The doctrine was, however, successfully argued in the Saskatchewan case of Badlwin v. Rhinhart[330a] and in the Alberta cases of Palinko v. Bower[331] and Overland v. Himelford.[332]

[330a] (1967), 63 D.L.R. (2d) 420 (Sask. Q.B.).

[331] [1975] 1 W.W.R. 756 (Alta. S.C.) rev'd on other grounds [1976] 4 W.W.R. 118 (Alta. C.A.) (also sub nom Palinka v. Bower). Here, it was not the non-consenting spouse who insisted upon his rights but rather the owner-spouse who set up the right of her spouse, notwithstanding his unwillingness to do so. The court held that the wife's conduct created an estoppel which prevented her from raising her husband's right to dower as a defence.

[332] [1920] 2 W.W.R. 481 at 490 (Alta. C.A.). The wife here had made a disposition of her contingent life estate and was not allowed to repudiate on the ground of lack of formal acknowledgment of consent. Beck J. applied the doctrine of estoppel and stated:

> She can undoubtedly make her own contracts . . . and is subject to estoppel, that is, to be prevented from making a claim to an estate, if, on all the facts and circumstances, it appears to the Court that it is inequitable that she should do so. To hold otherwise would be to put a check upon the whole present day current of legislation in favour of the equality of the sexes in regard to property and civil rights.

In the Baldwin case, Mr. Justice Sirois quoted with approval the following passage of Elwood J.A. in Lett v. Gettins:

> It seems to me that the wife of a homesteader could so conduct herself toward an intending purchaser of her husband's homestead that she could preclude herself from taking any objection to a sale. The object of the statute is not one of general public policy, but is for the benefit of a particular class of persons . . . .[333]

From a scrutiny of the various judicial pronouncements on the subject, much of the confusion and uncertainty as to whether or not the statutory requirement for a written consent could be released by estoppel appears to have emerged as a result of the wording of the statutes.[333a] The pertinent dower Acts suggested that the transaction was void rather than voidable. Generally speaking, no estoppel arises out of a void deed but it is otherwise in the case of deeds which are merely voidable.[334]

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[333] [1918] 3 W.W.R. 614 at 619 (Sask. C.A.).

[333a] The cases which have considered the doctrine of estoppel were reviewed by Shannon J. in Martens v. Burden (1974), 45 D.L.R. (3d) 123 at 142 (Alta. S.C.) and he concluded "that the doctrine of estoppel can rarely and perhaps never be used to avoid the consequences of non-compliance with the Dower Act". And see Warne v. Sweet (1980), 12 Alta. L.R. (2d) 104 at 109 (Prov.Ct.).

[334] Although a person cannot be estopped from alleging the invalidity of a transaction that is prohibited by statute on grounds of general public policy or that is ultra vires, the rule is otherwise where the transaction is one that must, at risk of statutory penalty, be performed in a certain way, pursuant to a statute that affects only a limited class of persons. see Hulowski v. Hulowski, [1945] 3 W.W.R. 140 (Sask. K.B.) aff'd [1945] 3 W.W.R. 753 (Sask. C.A.). The Court of Appeal did not, however, find it necessary to express an opinion as to whether or not the doctrine of estoppel could be applied to the provisions of the Saskatchewan Homesteads Act, as it disposed of the appeal on other grounds.

The Supreme Court of Canada has had occasion to consider the doctrine of estoppel in the context of dower but the court has simply assumed, without deciding, that the doctrine of estoppel might be invoked to preclude a spouse from averring that (s)he had not consented to the disposition in the manner prescribed by the legislation. Though the Supreme Court has never applied the doctrine, for in each instance, it has held that there was insufficient evidence on which it could be said that an estoppel could be founded.[335]

At this juncture, it may be useful to set forth a definition of estoppel by representation at common law. The essential factors which give rise to an estoppel were outlined by Martland J. in Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co. Ltd.[336] quoting from the English case of Greenwood v. Martins Bank Ltd.[337] and may be summarized as follows:

(1) A representation or conduct[338] amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

(2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.

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[335] See, for example, Meduk v. Soja, [1958] S.C.R. 167 at 176 where it was suggested that the doctrine of estoppel, if applicable, was restricted to a written representation by the spouse that (s)he assents to the disposition. And see British American Oil Co. Ltd. v. Kos (1963), 42 D.L.R. (2d) 426 at 433; Pinsky v. Wass, [1953] 1 S.C.R. 399 at 406.

[336] (1970), 74 W.W.R. 356 at 362 (S.C.C.).

[337] [1933] A.C. 51 at 57 (H.L.).

[338] It is generally accepted that any statement which purports to affirm, deny, describe or which otherwise relates to any existing fact, circumstance, or thing, or any past event, amounts in law to a representation. The second class of representations comprises those which are implied from the acts or conduct of the representor. We are not here referring to a statement de futuro which was expressed or intended by the parties to constitute a promise only. That is to say, an assurance as to future conduct only. A promise is not a "representation" and cannot operate to found an estoppel, except by way of promissory estoppel.

(3) Detriment to such person as a consequence of the act or omission. Mere silence cannot amount to a representation, but, when there is a duty to disclose, deliberate silence may become significant and amount to a representation.

It is the essence of estoppel that there should be two conflicting versions of the set of facts, one of which, previously put forward by the representor,[339] is the representation founding the estoppel; the other, later in time, is the version which (s)he is to be precluded by the estoppel from putting forward.[340] In strict theory, it may be said that the doctrine of estoppel by representation is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself/herself.[341]

The aim of the doctrine of estoppel is to uphold and maintain, and not to suppress or defeat, the truth inter partes. The Commission is of the view that the doctrine of estoppel by representation ought to be incorporated into the proposed regime. At the onset, we acknowledge that the doctrine will not always be an easy one to apply and that much will depend upon the context and circumstances of each case. Where, however, there has been a disposition without any pretence of consent on the part of the spouse, we do not think that this approach will in any manner jeopardize that spouse's rights in the homestead. Rather, it is the view of the Commission that the doctrine of estoppel will provide a more flexible approach to the question of non-compliance which approach should better serve the spirit and objects of "The Dower Act".

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[339] In the present context, the representor, the person making the representation, would be the spouse whose consent is required under the Act, and the representee is the person to whom the representation is made.

[340] Spencer, Bower and Turner, Estoppel By Representation (1977) at 80.

[341] Though, some contemporary writers suggest that it may also be considered as a breach of substantive law. See, for example, Phipson, The Law of Evidence (13th ed.) 1057.

We wish to emphasize, however, that there would be one very important proviso respecting the application of the doctrine of estoppel. Before a spouse could be estopped by reason of his/her conduct from averring that (s)he did not furnish the required consent, we think it incumbent upon the representee to establish that the spouse was fully apprised of his/her homestead rights.[342] In particular, this would include knowledge on the part of the spouse that (s)he had the right to prevent disposition of the homestead by withholding consent. This prerequisite of a full appreciation of existing homestead rights also appears to be a view recognized and supported by the courts when homestead rights are at issue.[343]

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[342] Strictly speaking, the necessity for actual knowledge on the part of the representor is a characteristic of an estoppel by silence, and in this respect such an estoppel would differ from estoppels based upon representations by words or positive conduct, in which the effect of the representee, not the state of mind of the representor, is the aspect of the matter with which the court would be principally concerned. Supra n. 340 at 288.

[343] See, for example, Pinsky v. Wass supra n. 335 at 406 where Estey J. states:

> This requirement of the statute was not complied with, nor does the evidence establish any basis for holding that he is estopped from asserting his dower rights. There is no evidence that he was aware of his dower rights; in fact, throughout they were never mentioned. (emphasis added)

And see Meduk v. Soja, supra n. 335 where the husband was asked by the real estate agent, in the presence of the prospective purchasers, whether he would sign the agreement and said that he would not, since the property belonged to his wife and she could do what she pleased with it. He was in fact in agreement with the sale and actually took overt steps toward facilitating possession being given to the purchasers. It is equally clear, though, that he was unaware of his dower rights and, in particular, that he had the right to prevent the disposition by withholding his consent. Accordingly, it was held that "a transaction expressly forbidden by statute was not rendered valid by the circumstance that the parties to it were all ignorant of the statutory prohibition".

While it will without doubt be difficult to prove this subjective knowledge, the court, in an appropriate case, could infer, on a preponderance of the evidence, that the spouse was aware of his/her homestead rights. For example, in the case of McClenaghan v. Haley[344] where the wife had affixed her signature to the offer to purchase, as a joint owner, indicating her willingness to dispose of the home, the court was able to infer that she was fully aware of her homestead rights, as she had earlier consented to a mortgage on the premises in question in the form prescribed by the Act.

In recommending the incorporation of this doctrine into the proposed regime, we think it essential to form a clear conception of the nature of the representation on which an estoppel may be founded. The onus would be on the representee of establishing the precise acts and conduct alleged, and further, of showing that the acts and conduct so proved were of such an unequivocal character as to represent the existence of a then present intention and readiness on the part of the spouse to consent to the proposed disposition. Factors such as any writing evidencing the consent of the spouse, the spouse's direct and willing participation in the negotiations respecting the proposed disposition, and the spouse's very initiation of the transaction itself would all be relevant, though not necessarily determinative of the issue as to whether or not the spouse consented to the disposition. The representation relied upon must, of course, emanate from the spouse whose consent is required and not the owner-spouse.

In summary, the doctrine of estoppel should prevent a spouse from insisting upon strict legal rights arising by statute when it would be inequitable for him/her to do so having regard to the dealings which have taken place between the parties. In our estimation, no estoppel should be raised simply by mere silence on the part of a spouse standing by or on the careless abstention by the spouse from the assertion of homestead rights. Generally stated, there can be no estoppel arising from mere silence unless the representor is under a legal duty to speak.[345] The non-owning spouse should not, in our view, be under any duty or legal obligation to advise the third party as to the existence of his/her homestead rights.

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[344] (1983), 148 D.L.R. (3d) 577 (Sask. C.A.).

[345] See, for example, British American Oil Co. Ltd. v. Kos, supra n. 335 at 434.

The application of the doctrine should be limited to the spouse who with full knowledge of homestead rights and who through deliberate words or unequivocal acts contrives to convey the representation that (s)he concurs in and assents to the proposed disposition. On balance, we think it fair to state that a spouse would not often be estopped from averring that (s)he had not consented to the disposition in the manner prescribed by the legislation, as the third party must fall squarely within its parameters to take its benefit. Accordingly, we recommend:

> *RECOMMENDATION 79*
>
> *That where the spouse, with full knowledge of his/her homestead rights, has led the other party to the transaction to believe that (s)he consented to the disposition, the court may, in its discretion, order that the spouse be estopped from denying the lack of written consent in conformity to the Act.*

6. Remedies of Non-consenting Spouse

We turn to consider what, if any, remedies should be available to the non-consenting spouse where his/her spouse has effected a disposition of the homestead in contravention of the requirement of written consent. It should be recalled that a disposition may not be set aside upon application of the non-consenting spouse where a properly signed certificate of acknowledgment exists or where a duly executed dower affidavit has been sworn, unless the person acquiring the interest in the property had actual knowledge to the contrary, or unless the transaction was tainted with fraud in which that person participated. For purposes of the present discussion, it is assumed that the disposition itself is beyond attack.[344]

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[344] It is worthy of note that the proposed anti-avoidance measures would provide no relief to the non-consenting spouse where the disposition is made to a bona fide third party for full consideration.

It is readily apparent that the non-owning spouse is dependent upon the owner's good faith; rights in the homestead may easily be extinguished.[345] For example, the owner may falsely swear in an affidavit that (s)he has no spouse or that the property is not the homestead thereby defeating the rights of the innocent spouse. Where statements are made knowing that the assertions are false, there may well be the possibility of prosecution under the Criminal Code.[346] In addition, penalties are imposed pursuant to section 176(1) of "The Real Property Act" where a person wilfully makes a false statement and the same are paid to the Minister of Finance. These, however, would do nothing to restore the lost interest of the innocent spouse.

We have observed that The Dower Act of Alberta expressly confers a cause of action for damages on the non-consenting spouse if a disposition of the homestead results in the registration of title in the name of any other person and is made without consent.[347] The loss is fixed by the Act at one-half the value of the property transferred or the consideration received, whichever sum is larger.[348] Alberta's Dower Act was intended to make the first transfer indefeasible and to convert the spouse's right to refuse consent and the loss of a contingent life estate into an action against his/her spouse for damages. Like Alberta, we think it advisable to set forth an express cause of action against the owner if a disposition of the homestead is made without consent.

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[345] This risk may be avoided if the non-owning spouse, fearing that the owner might make an improper disposition, had taken the precaution to file a caveat against the homestead. The dower caveat is not the same as other caveats whereby instruments can be registered subject to the caveat. Upon the filing of a "dower caveat", the district registrar may not complete the registration of any disposition, unless the caveat is withdrawn, vacated or discharged.

[346] See Section 122 of the Criminal Code, R.S.C. 1970, c. C-34.

[347] The Dower Act, R.S.A. 1980, c. D-38, s. 11(1). Indeed, the Alberta Act goes further by imposing a penalty, of either a fine of not more than $1,000 or a term of imprisonment of not more than 2 years, on the married person who makes an improper disposition.

[348] The Dower Act, R.S.A. 1980, c. D-38, s. 11(2).

We would, however, propose one modification. We would not limit this remedy to simply those dispositions that result in the issuance of a new certificate of title. Many dispositions, such as leases or mortgages, are not ordinarily followed by the issuance of a new certificate of title. While it is true that in Alberta, only the registration of a transfer of land and subsequent issuance of a new title extinguishes homestead rights,[348a] this is not the case for Manitoba. Where the curative provisions respecting either a dower affidavit or a certificate of acknowledgment are applicable, all dispositions within the ambit of the Act are expressly accorded validity in Manitoba. Hence, we see no reason why all dispositions, within the meaning of "The Dower Act", should not also confer a specific cause of action on the spouse, where that spouse's consent was not obtained in accordance with the formalities laid down under the Act.

To set forth a specific cause of action raises a rather thorny question: what should the proper measure of damages be? With respect to the life estate, only if the claimant spouse should survive his/her spouse would (s)he in fact be deprived of the life estate in the homestead. Accordingly, it has been argued that the claimant spouse may not have lost anything of value. We are not persuaded by this argument and see no merit in recommending a "wait and see" approach in order to assess the measure of damages by evaluating the life estate in the particular homestead, if and when the claimant spouse survives the owner.

[348a] See W.F. Bowker, "Reform of the Law of Dower in Alberta" (1960), 1 Alta. L. Rev. 501 at 505 where he comments:

> It was not long before queries were raised in Alberta as to the effect of a sale made without a validly executed consent and objected to by the spouse or even by the vendor before registration of a transfer, and as to the validity of a mortgage, lease, oil lease, or easement. It is quite clear that these are all dispositions, but are not followed by the issue of a new title so the spouse never can have an action for half the purchase price. (emphasis added)

Moreover, statutory provisions presently exist which attempt to compensate for the loss of the contingent life estate. For example, under section 13 of "The Dower Act", where the consent of the spouse is dispensed with, the court may direct that an amount be paid to the non-owning spouse or remain a charge upon the homestead or be otherwise secured.[349] The intent here appears to be compensation to the spouse for the loss of a right to claim a life estate in the event of the owner's death. Similarly, where an order for sale is granted under "The Law of Property Act", the court may determine the value of inchoate rights under "The Dower Act" and order that the amount of that value be paid to the spouse who has lost the homestead protections.[350]

Furthermore, quite apart from the loss of an inchoate life estate, the right to prevent disposition of the homestead by withholding consent, or the "veto power" as it is aptly termed, is also infringed by an improper disposition. We have observed that a number of provinces have recently incorporated a statutory provision prohibiting a spouse from disposing of any interest in the home unless the other spouse joins in the instrument or consents.[351] These same jurisdictions provide that where a spouse makes a false affidavit in order to effect a disposition of the home or encumbrance the court may direct that spouse to pay damages. For example, subsection 45(1)(f) of the Ontario Family Law Reform Act provides that the court on application may direct the person who swore the false affidavit "to substitute other real property for the matrimonial home or direct such person to set aside money or security to stand in place thereof subject to such terms and conditions as the court considers appropriate". In short, it is our view that the denial of the right to withhold consent in addition to the loss of the contingent life estate, should the spouse have survived the owner, justify some form of compensation for the wronged spouse.

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[349] See, for example, Monchamp v. Monchamp (1953), 60 Man. R. 412 (C.A.); Waldock v. Waldock, [1943] 3 W.W.R. 177 (Man. K.B.).

[350] Though, the formula set forth under section 24 for determining the value of inchoate dower rights has posed some difficulty. O'Sullivan J.A. in Winspear Higgins v. Friesen, [1978] 5 W.W.R. 337 at 341 (Man. C.A.) noted that he would have some difficulty in determining and applying the "principles applicable to deferred annuities and survivorship".

[351] See, for example, Family Law Reform Act, R.S.O. 1980, c. 152, s. 42(1); The Marital Property Act, 1980 S.N.B., c. M-1.1, s. 19(1); The Matrimonial Property Act, 1979 S.N. c. 32, s. 8.

With respect to the measure of damages, we prefer the discretionary approach adopted in Ontario and other jurisdictions rather than Alberta's fixed formula. As mentioned earlier, Alberta arbitrarily fixes the damages to which a spouse is entitled at one-half the value of the property. We believe that the discretionary approach will provide greater flexibility to meet the facts and circumstances of each particular case.

The Dower Act of Alberta further provides that this action for damages may be commenced or continued against the deceased owner's estate but liability is limited to those estate assets that remain undistributed as at the time of service of the claim. In addition, a specific limitation period is set forth, namely, that the action must be commenced within six years from the discovery by the spouse of the disposition, and within two years from the death of the owner. We believe that these provisions would be desirable and should therefore be incorporated. Accordingly, we recommend:

RECOMMENDATION 80

That the non-consenting spouse should have a cause of action against the owner-spouse if a disposition of the homestead is made without consent through the fraud or wrongful act of the owner spouse.

RECOMMENDATION 81

That on application by the non-consenting spouse, the court may, in its discretion, determine the amount of damages to be paid by the owner-spouse subject to such terms and conditions as the court considers appropriate.

RECOMMENDATION 82

That if the owner spouse dies, the action for damages may be commenced or continued against the estate of the deceased spouse, but the liability of the personal representative named in the action is limited to those estate assets which are undistributed at the time of the service of the originating notice upon the personal representative.

RECOMMENDATION 83

That no action for damages should be commenced except within six years from the discovery by the spouse of the disposition, and within two years from the death of the owner spouse.

It is the view of the Commission that where the owner spouse has satisfied the judgment in full there should be some mechanism or procedure whereby the owner spouse could preclude his/her spouse from subsequently invoking homestead rights in any land registered or to be registered in the name of the owner spouse. Here too, we would adopt the Alberta approach which enables the owner spouse to register a certified copy of the judgment in the land titles office upon producing proof satisfactory to the Registrar that the judgment has been paid in full. Once this judgment has been registered, the land ceases to be a homestead for the purposes of the Act and no homestead rights attach to any land to be registered in the name of the owner spouse. Accordingly, we recommend:

RECOMMENDATION 84

That where the non-consenting spouse recovers a judgment against the owner spouse when a disposition of the homestead is made without consent, the owner spouse, on producing proof satisfactory to the Registrar of Land Titles that the judgment has been paid in full, may register a certified copy of the judgment in the proper land titles office.

RECOMMENDATION 85

That upon registration of the certified copy of the judgment, the spouse of the owner ceases to have any homestead rights in any land registered or to be registered in the name of the owner spouse.

It remains to consider whether the non-consenting spouse who has been wrongfully deprived of his/her rights in the homestead should be entitled to compensation from the Assurance Fund set forth under "The Real Property Act". The object of the Assurance Fund is to indemnify those whose rights have been extinguished by reason of the application of principles of Torrens law under "The Real Property Act".[352] While it is inherent within the Torrens system generally to prefer the rights of bona fide third parties, this has not been done without providing alternative remedies to those persons deprived of land or any interest therein. Subsection 167(2) of "The Real Property Act" provides as follows:

> A person, deprived of any land, mortgage, or encumbrance, or of any estate or interest therein, through the bringing of the land under this Act, or by the registration of any other person as owner of the land, mortgage, encumbrance, estate, or interest, or by an error, omission, or misdescription, in a certificate of title, and who by this Act is precluded from bringing an action for the recovery of the land, mortgage, or encumbrance, or the estate or interest therein, may bring an action against the district registrar of the district in which the land is situated for the recovery of the damage suffered thereby.

It is not necessary to prove any error on the part of the district registrar, as "The Real Property Act" expressly contemplates actions against the Fund arising from the "fraud or wrongful act of some person other than the district registrar".[353] In such a case, the action must be commenced against both the district registrar and the person who has perpetrated the fraud or wrongful act. Under subsection 167(4), if the court determines that the person who has caused the loss ought to pay for the damages, the claimant must demonstrate to a court that the judgment cannot be satisfied, as a condition precedent to obtaining a judgment against the district registrar.

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[352] Funds for the Assurance Fund are obtained from the prescribed fees received when old system land is first brought under "The Real Property Act".

[353] Holigrocki v. Holigrocki (1966), 60 D.L.R. (2d) 440 (Man. Q.B.) at 444. Mr. Justice Wilson comments: "In my opinion, the Legislature, in enacting s. 172(3), [now 167(3)] clearly intended that in a proper case the Fund would embrace claims beyond those caused solely by fault of a district registrar".

It is not enough simply to establish that a loss has been suffered; the person must establish that (s)he was entitled to succeed but for the Torrens system. It would seem that the non-consenting spouse's loss does arise as a result of the operation of the Torrens system. But for section 62(1) of "The Real Property Act" and subsections 8(4) and 8(7) of "The Dower Act", it would appear that dower rights would not be defeasible where a spouse makes a disposition in contravention of the requirement of consent. At common law, if the husband disposed of land without the consent of his wife or the release of her dower interest, the property remained encumbered by it. The third party's ownership was vulnerable to partial divestiture; if the wife survived her husband, she could claim a life estate in the property in priority to those otherwise entitled.

There appears to be but one reported case in Manitoba which has considered the application of these sections with respect of the loss of dower rights. In McInnis v. District Registrar[354] the husband sold the homestead by swearing a false affidavit stating that no part of the land had ever been his homestead. In addition, the husband presented an affidavit to the effect that he believed that the duplicate certificate of title had been burned.[355] The district registrar, relying upon the two affidavits, accepted the transfer for registration. The wife sued the district registrar claiming damages for loss of her dower rights in the land but failed to name her husband as a party to the action. The court held that the district registrar could not be said to have committed any omission, mistake or misfeasance within the meaning of section 167(1) of "The Real Property Act". Leave was granted, however, to bring an action naming both the district registrar and the husband under subsection 167(3) which, as we noted earlier, does not require proof of any error on the part of the district registrar. Regrettably, what occurred thereafter is not reported.

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[354] (1954), 62 Man. R. 65 (Q.B.).

[355] He was unable to produce the certificate of title as he had earlier placed it in his wife's possession.

On principle, it is the view of the Commission that the non-consenting spouse, whose rights are defeasible, should be entitled to seek compensation. We have observed that The Dower Act of Alberta expressly provides the right to obtain payment from the Assurance Fund of an unsatisfied judgment against the owner spouse in respect of a disposition of the homestead that is made without consent.[356] Before compensation may be sought from the Assurance Fund, it is encumbent upon the non-consenting spouse to pursue his/her right of action against the other spouse for one-half the value of the property wrongfully conveyed.

We propose that a similar two-fold remedy be adopted in Manitoba.[357] The wording of subsection 167(2) in its present form may, however, pose some difficulty. It has been suggested that while the owner spouse is alive, the claimant would have no land or estate or interest therein within the meaning of subsection 167(2), but merely a statutory right of veto.[358] To remove all doubt, we think it advisable to provide expressly that in the event of non-collection of any judgment against the spouse who perpetrated the fraud or wrongful act, a claim for payment may be directed to the Assurance Fund. In accordance with subsection 167(3), both the district registrar and spouse should be named in the action and a judgment secured against the registrar as a nominal defendant, as a prerequisite to obtaining compensation from the Assurance Fund. Final judgment should not be entered against the district registrar until the court makes an order declaring that the judgment cannot be satisfied in whole or in part out of the property of the owner spouse. In other words, the provisions of "The Real Property Act" relating to the Assurance Fund and recovery from it should generally apply to applications out of the Fund. Accordingly, we recommend:

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[356] The Dower Act, R.S.A. 1980, c. D-38, s. 13.

[357] A Legislative Committee of the Manitoba Bar Association, in its review of "The Dower Act" earlier recommended that a spouse who suffers damage as a result of a false affidavit or declaration by his/her spouse should have a right to claim against the Assurance Fund. It was proposed that the amount to be allowed should be fixed by the court but should be limited to a maximum of $5,000. See (1962-66) Vol. 34-35 Manitoba Bar News 7 at 17.

[358] This argument was noted by counsel in the case of McInnis v. District Registrar, supra n. 354. See also Menning v. Rural Municipality of St. Andrews (1952), 4 W.W.R. (N.S.). 427 (Man. K.B.).

RECOMMENDATION 86

That "The Real Property Act" be amended to ensure that the non-consenting spouse has the right to obtain payment from the Assurance Fund of an unsatisfied judgment against the owner spouse in respect of a disposition of the homestead that is made without consent through the fraud or wrongful act of the owner spouse.

CHAPTER 6

IMPLEMENTATION OF REFORM

We discuss in this Chapter the implementation of the recommendations which we have proposed in both Part I and Part II of this Report. We shall first set forth the mechanics of reform respecting the operation of a deferred sharing regime on death. What then follows is the implementation of the recommendations concerning the homestead protections. Finally, we examine a number of consequential amendments which the Commission considers necessary.

A. PART I - DEFERRED SHARING REGIME

In Chapter 2 we recommend the general repeal of the fixed share set forth under "The Dower Act" and the adoption of a deferred sharing regime operative on death. In our view, it would be most desirable to have a single, comprehensive statute setting forth all provisions regulating the distribution of marital property, whether during the spouses' joint lives or on death. As the proposed regime is based generally upon the principles set out in "The Marital Property Act", it seems appropriate that the scheme should be housed in that Act. In particular, it could be implemented by way of a separate section entitled Part IV - Sharing of Assets on the Death of a Spouse. The basic intent to be embodied would be that the general provisions relating to an accounting during the spouses joint lives should apply to an allocation of property on death, unless otherwise provided.[359]

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[359] It would appear that both Saskatchewan and New Brunswick, in part, have adopted this approach. The Saskatchewan Matrimonial Property Act, for example, creates a separate part entitled "Application on Death of Spouse" and then provides that the Act applies mutatis mutandis in respect of the estate of the deceased spouse and the property of the deceased spouse.

One such proviso, for example, would be the absence of a discretionary power vested in the court to vary the equal division of family and commercial assets in an accounting on death. The further specialized rules set forth in the recommendations contained in Part One and which govern an allocation of property on death would comprise the balance of this separate part. Accordingly, we recommend:

RECOMMENDATION 87

That the proposed deferred sharing regime on death be implemented by way of amendment to "The Marital Property act" setting forth a new separate part to the Act to be entitled "Sharing of Assets on the Death of a Spouse" and which part should set out the specialized rules governing an allocation of property on death.

1. Transitional Provisions

The Commission favours the inclusion of a specified transition period. We think that a deferred sharing regime operative on death should contain a provision that limits its application to deaths occurring on or after the date that the proposed regime comes into force. The operative date of the proposed regime should be deferred six months to give the bench, bar and public time to become familiar with its provisions. Those provisions of "The Dower Act", which relate to the fixed share, should be preserved where the surviving spouse elects to take a fixed share of the estate of a person who has died prior to the coming into force of the proposed deferred sharing regime. Accordingly, we recommend:

RECOMMENDATION 88

That there be a transition period of at least six months between the date the legislation is enacted and when it becomes effective.

RECOMMENDATION 89

That the proposed deferred sharing regime on death should apply only to estates of spouses who die on or after the date on which the regime is to take effect.

RECOMMENDATION 90

That in respect of the death of a spouse before the operative date of the proposed regime, the fixed share set forth in Section 15 of "The Dower Act", and sections related thereto, should govern the surviving spouse's entitlement to share in the deceased spouse's estate.

B. PART II - THE HOMESTEAD PROTECTIONS

To implement the homestead protections, we recommend the general repeal of the present Dower Act and the enactment of a (Proposed) Homesteads Act similar to the one which we have set forth in Appendix G. We wish to emphasize again, however, our lack of the necessary expertise which is required for purposes of legislative drafting, and the proposed Act is attached simply as a possible model. Ideally, we should like to recommend that the homestead protections also be incorporated into "The Marital Property Act" but, as we have already noted, the definition of the home for purposes of the homestead protections, of necessity, differs from the definition of "marital home" under "The Marital Property Act". Accordingly, The (Proposed) Homestead Act is confined to those traditional protections afforded to the homestead, namely, the surviving spouse's entitlement to a life estate in the homestead and the non-owning spouse's "veto power" over any disposition of the homestead. It is for this reason that we suggest that the name of the Act be changed to "The Homesteads Act".

For the most part, the proposed Act contains few new sections. We identify these sections and other amendments by way of an asterisk in the margin of the Act. No specific comment is made in this Report on a number of sections included in the proposed Act as they are simply drawn from the present Dower Act. In our estimation, these sections were not open to serious criticism nor in need of reform. In subsection 17(3) of the proposed Act, the counterpart to subsection 11(3) of the present Dower Act, we make one change in drafting to remove the element of fault in determining whether the spouse should be entitled to a share of the surplus of proceeds from the sale of the homestead.[360] With but one exception in the proposed Act, we employ the expressions, "married person" and "the spouse of the married person" rather than "husband" and "wife". Accordingly, we recommend:

> *RECOMMENDATION 91*
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> *That the present Dower Act be repealed and that the legislature enact a statute similar to The (Proposed) Homesteads Act found in Appendix G to this Report to implement the Commission's recommendations.*

1. Transitional Provisions

As it is proposed in Recommendations 75 and 76 that the prescribed form for written consent and the certificate of acknowledgment be amended, it is necessary to ensure that any written consent executed in the proper form prior to the commencement of our proposals and any certificate of acknowledgment duly executed by an authorized person, would be accorded the same force and effect it would have had prior to the introduction of the new forms. Similarly, as a husband is not now required to acknowledge his consent apart from his wife, the absence of same would have no bearing upon the validity and enforceability of a disposition made before the proposed Act comes into force. In short, in determining whether or not a disposition of the homestead, made before the proposed recommendations take effect, has been consented to in the manner and form prescribed by legislation, the present requirements set forth under "The Dower Act" should govern.

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[360] Where the spouses are living separate and apart, we provide the court with a discretionary power to order that the spouse should not be entitled to a share of any surplus of the purchase monies arising from the sale of the homestead. As in the case of section 13(1) of the present Dower Act, we think that this approach would permit the court to defer the sharing of these sale proceeds until the hearing of the main marital application on its merits if such other matrimonial matters are before the court or contemplated under "The Marital Property Act".

Similarly, it is the view of the Commission that where the surviving spouse is entitled to a life estate in the homestead by reason of the death of the owner before The (Proposed) Homesteads Act takes effect, that spouse should not have this homestead protection diminished by reason of the coming into force of the new Act. In other words, the homestead as defined in the present Dower Act should continue to determine the extent of the life estate in the homestead in such cases. While we have submitted formal recommendations concerning the transitional provisions, we have not attempted to draft same in the attached Act as we think their drafting is best left to the expertise of Legislative Counsel.[361] Accordingly, we recommend:

RECOMMENDATION 92

That recommendations 75 and 76 not affect any disposition which is made before the date the legislation implementing these recommendations comes into force.

RECOMMENDATION 93

That the definition of homestead as set out in the present Dower Act should apply where a spouse has acquired homestead rights in the homestead by reason of the death of the owner of the homestead prior to the coming into force of The (Proposed) Homesteads Act.

We would not, however, so limit the application of the doctrine of estoppel. Where a spouse has not consented to the disposition in the form and manner prescribed by the present Dower Act, we think it should be open to the third party to invoke the statutory provisions respecting the doctrine of estoppel in The (Proposed) Homesteads Act, notwithstanding the fact that the disposition was made before the date the legislation comes into force. Simply put, where the requirements of "The Dower Act" have not been met, in the case of a disposition made before the proposed Act becomes operative, the disposition may be set aside at the instance of the non-consenting spouse alone. This, of course, would be subject to the third party's entitlement to invoke the doctrine of estoppel as a defence to such an application by the non-consenting spouse to set aside the disposition. Accordingly, we recommend:

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[361] We would point out that subsections 26(1) and 26(2) in the attached Act are simply drawn from the present Act and should be reviewed for purposes of drafting the transitional provisions.

> ***RECOMMENDATION 94***
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> *That if a disposition of the homestead, made before The (Proposed) Homesteads Act comes into force, has not been consented to in the manner and form prescribed by "The Dower Act", The (Proposed) Homesteads Act should apply to determine the validity and enforceability of such a disposition.*

C. Consequential Amendments

In light of our recommendations, certain consequential changes should be made to existing enactments. Rather than submit formal recommendations, we simply identify those statutory provisions which would require amendment, and the nature of the proposed amendment, namely:

	Statutory Provision	Brief Description of Proposed Amendment
A.	"The Wills Act", C.C.S.M. c. W150 "The Devolution of Estates Act", C.C.S.M. c. D70	These Acts should both be amended to ensure that each Act would be subject to the deferred sharing regime on death set forth under "The Marital Property Act".
B.	"The Trustee Act", C.C.S.M. c. T160 Recent amendments to section 61(1) et seq. of "The Trustee Act" require court approval in order to vary or terminate any trust before the expiry of the period of its natural duration as determined by the terms of the trust. The legislation sets forth specific critera for approval which must be satisfied before the court can approve a proposed arrangement. For purposes of an allocation of	For the avoidance of doubt, the provisions of "The Trustee Act" relating to the variation of trusts should be specifically excluded from the operation of the deferred sharing regime on death.

	property on death, cases may arise where a trust arising by will would have to be terminated or varied in order to satisfy a balancing claim in favour of the surviving spouse. In such cases, we do not think that the provisions relating to the variation of trusts should have any bearing on the survivor's entitlement to seek an accounting nor upon the payment of the balancing claim.	
C.	"The Testators Family Maintenace Act", C.C.S.M. c. T50	Subsections 22(1) and (2) of the Act should be repealed in light of recommendation 21 and the Act amended to ensure that a balancing claim in favour of the surviving spouse should take precedence over any application under "The Testators Family Maintenance Act".
D.	"The Limitation of Actions Act", C.C.S.M. c. CL150 In accordance with section 6 of this Act, a specific limitation provision in another Act must be set forth in Schedule A to "The Limitation of Actions Act" in order to have any force or effect.	The Act should be amended to include "The Homesteads Act" in Schedule A to ensure that the special limitation period respecting an action for damages set forth in recommendation 83 would be applicable.
E.	"The Marital Property Act", C.C.S.M. c. M45 The extent of the necessary amendments to "The Marital Property Act" will, in large measure depend upon precisely how the proposed regime is incorporated into the Act. As it is not possible to set forth an exhaustive list of the consequential amendments required until the regime has been drafted, we merely identify a few preliminary amendments.	Preamble of Act should be amended to reflect that the termination of the marriage by death entitles the surviving spouse to an equal sharing of assets. Subsection 2(4) should be amended to limit its application to an accounting during the spouses' joint lives. Subsection 24(2) and subsection 18(1) are no longer required in light of the proposed scheme and should therefore be repealed.

F. All Manitoba statutes which refer to "The Dower Act" should be amended to read "The Homesteads Act".

CHAPTER 7

SUMMARY OF RECOMMENDATIONS

PART ONE

DEFERRED SHARING ON DEATH

1. That the fixed share set forth in section 15 of "The Dower Act" be repealed. (p. 47)

2. That there be enacted in Manitoba a deferred sharing regime operative on death. (p. 47)

PROPERTY SUBJECT TO AN ACCOUNTING ON DEATH

3. That the rules set forth in "The Marital Property Act" which determine whether a particular asset is shareable in an accounting during the spouses' joint lives apply mutatis mutandis with respect to an accounting of property on death. (p. 52)

4. That for purposes of an accounting on death the following property should also be included in the deceased spouse's inventory:

   (i) the proceeds of a policy of life insurance on the life of the deceased spouse and owned by either spouse which proceeds are payable to the estate; and

   (ii) any other sum of money payable to the estate by reason of the death of the deceased spouse. (p. 54)

5. That for purposes of an accounting on death, the full value of property acquired by the surviving spouse on the death of the predeceasing spouse by virtue of:

   (i) a right of survivorship;

   (ii) a pension plan or other lump sum or periodic payment payable to the surviving spouse in his/her capacity as survivor of the deceased spouse; and

   (iii) the proceeds of a policy of life insurance on the life of the deceased spouse owned by either spouse which proceeds are payable to the surviving spouse

   should also be included in the surviving spouse's inventory. (pp. 54-55)

CLOSING AND VALUATION DATE

6. That, subject to the exception set forth in recommendation 7, for purposes of an accounting on death the closing date for the inclusion of assets and liabilities in the accounting, and the valuation date for each asset and liability, should be the date of death of the spouse. (p. 56)

7. That for purposes of an accounting on death, where spouses are living separate and apart as at the date of death of the predeceasing spouse and have not yet effected a complete property settlement by way of agreement or court order, the closing date for the inclusion of assets and liabilities in the accounting, and the valuation date for each asset and liability, should be the date when the spouses last cohabited with each other. (p. 56)

PRIORITY OF CREDITORS

8. That all enforceable claims of third party creditors and all funeral and testamentary expenses have priority over the payment of a balancing claim in an accounting on death. (p. 56)

NO COURT APPLICATION

9. That, subject to the exceptions in recommendation 10, the personal representative of the deceased spouse's estate may agree with the surviving spouse as to the equal distribution of property on death without resort to a court application. (p. 62)

10. That where the surviving spouse is the personal representative of the deceased spouse's estate and where:

    (i) one or more of the named beneficiaries of the estate is a minor; or

    (ii) there is the absence of written consent from one or more of the named beneficiaries of the deceased's estate as to the proposed distribution of property in favour of the surviving spouse;

    no settlement or agreement respecting the allocation of property on death in favour of the surviving spouse should be valid unless it is approved by a judge of the Family Division of the Court of Queen's Bench. (p. 63)

11. That in the event of any question or dispute arising as to the proper accounting of property on death, the surviving spouse, the deceased spouse's personal representative, or any possible beneficiary may apply to the Family Division of the Court of Queen's Bench for the determination of the matter. (p. 63)

NO DISCRETIONARY POWER FOR AN ACCOUNTING ON DEATH

12. That for purposes of an accounting on death, there should be no discretionary power vested in the Court to vary the equal division of family and commercial assets. (p. 69)

RIGHT OF PERSONAL REPRESENTATIVE TO SEEK AN ACCOUNTING

13. That, subject to the exceptions set forth in Recommendation 14, the right to seek an accounting on death does not survive the death of that person for the benefit of his/her estate. (p. 72)

14. That an application for an accounting commenced by the spouse before the death of that spouse or commenced by a surviving spouse after the death of the other spouse may be continued by the estate of a deceased spouse and should be determined in accordance with the proposed rules governing an accounting of property on death. (p. 73)

INTERACTION OF DEFERRED SHARING REGIME AND RULES OF INTESTATE SUCCESSION

15. That where the surviving spouse seeks an allocation of property on death, any balancing claim in favour of the surviving spouse should be reduced by the entitlement of the surviving spouse under "The Devolution of Estates Act". (p. 79)

BENEFITS CONFERRED BY WILL

16. That, except for a life estate in the homestead, every bequest, gift or devise contained in the deceased spouse's will which passes or has passed to the surviving spouse or which would have passed to the surviving spouse but was renounced should be charged against the balancing claim. (p. 83)

INTERACTION OF DEFERRED SHARING REGIME AND "THE TESTATORS FAMILY MAINTENANCE ACT

17. That an accounting of property on death should not bar the right of the surviving spouse to make an application under "The Testators Family Maintenance Act". (p. 84)

18. That an application under "The Testators Family Maintenance Act" may be joined with an application to seek an accounting of property on death. (p. 84)

19. That an amendment be made to "The Testators Family Maintenance Act" to provide that the Court, in determining whether adequate provision for the proper maintenance and support of the surviving spouse has been made, should have regard to any allocation of property received by the surviving spouse by virtue of an accounting on death. (p. 84)

PRIORITY OF BALANCING PAYMENT

20. That a balancing payment should have priority over all bequests, gifts and devises contained in the deceased spouse's will. (p. 86)

21. That "The Testators Family Maintenance Act" be amended to reflect that the authority of the court under that Act is subject to the prior right of a surviving spouse to seek an accounting on death. (p. 87)

22. That unless a contrary intention appears from the will of a deceased spouse, the incidence of any balancing payment made after the death of a spouse should fall rateably upon the whole estate, other than that portion of the estate, if any, to which the surviving spouse is entitled. (p. 89)

23. That where a contrary intention appears in the will, the judge may order that the balancing payment be made out of and charged against any portion of the estate in such proportion and in such manner as seems proper. (p. 89)

RIGHT OF SEPARATED SURVIVING SPOUSE TO SEEK AN ACCOUNTING ON DEATH

24. That where there has been a complete property settlement by way of court order or separation agreement, no accounting of property on death may be sought by the surviving spouse unless the spouses have resumed cohabitation after the property settlement was made. (p. 91)

25. That where the spouses have resumed cohabitation after effecting a complete property settlement, an accounting of after-acquired property may be sought on death by the surviving spouse if the reconciliation is subsisting at the time of the deceased's death. (p. 91)

PROCEDURE FOR AN ACCOUNTING ON DEATH

26. That subject to recommendation 27, before the expiry of one month after issuance of the grant of probate or letters of administration, the deceased spouse's personal representative should cause a notice, summarily setting forth the surviving spouse's entitlement to an accounting of property on death, to be served upon the surviving spouse in the form and manner prescribed by the rules of court. (p. 93)

27. That where, in the opinion of the court, every reasonable effort has been made to serve the notice on the surviving spouse, the court may dispense with the requirement of such notice in respect of the surviving spouse who has not been served. (p. 94)

28. That the surviving spouse may file a written election in the form prescribed by the Rules of Court as to whether (s)he desires to seek an accounting on death; and where the surviving spouse elects not to seek an accounting, (s)he should be deemed to be a consenting party to the provisions of the will and the surviving spouse has no rights except as given him/her under the will. (p. 94).

29. That such an election should be filed in the office of the deputy registrar in the appropriate judicial centre and the deputy registrar should give to any person applying therefor a certificate showing what election, if any, has been made. (p. 95).

30. That where the surviving spouse wishes to seek an accounting on death, both the surviving spouse and the deceased's personal representative have the mutual obligation to provide each other, upon written request from the other, with a sworn statement that makes full disclosure of all property and debts of the spouse in the manner and form prescribed by the Rules of Court. (p. 96)

LIMITATION PERIOD

31. That subject to the exceptions set forth in recommendation 32, no application to seek an accounting of property on death should be commenced against the estate of the deceased spouse after six months from the grant of probate of the will or issuance of the letters of administration. (p. 97)

32. That where the survivor is prevented:

    (a) by lack of knowledge of the occurrence of the death of a spouse; or

    (b) by the failure of the deceased spouse's personal representative to serve the required notice set forth in recommendation 26; or

    (c) by circumstances reasonably beyond the spouse's control; or

    (d) by reason of the discovery, after the lapse of the limitation period, of shareable property belonging to the deceased spouse;

    from commencing an application within six months of the grant of probate or the issuance of the letters of administration, the court may extend the period by such length of time as it deems fit as to any portion of the estate remaining undistributed at the date of the application. (pp. 98-99)

33. That for purposes of an application made after the six months from the grant of probate or the issuance of the letters of administration, assets of the estate held by the personal representative of the deceased as trustee should be deemed to be undistributed. (p. 99)

DISTRIBUTION BY THE PERSONAL REPRESENTATIVE

34. That the personal representative should not encumber or distribute any portion of the estate to a beneficiary before the expiry of the limitation period where there is the expectation or possibility that an application for an accounting on death may be sought. (p. 101)

APPLICATION OF DEFERRED SHARING REGIME

35. That subject to the exception in recommendation 89, the proposed deferred sharing regime on death should apply to all spouses, whether married before or after the coming into force of the proposed regime and whether married within Manitoba or a jurisdiction outside of Manitoba,

(a) if the habitual residence of both spouses is in Manitoba,

(b) where each of the spouses has a different habitual residence, if the last common habitual residence of the spouses was in Manitoba; or

(c) where each of the spouses has a different habitual residence and the spouses have not established a common habitual residence since the solemnization of their marriage, if the habitual residence of both at the time of the solemnization was in Manitoba. (pp. 103)

36. That the deferred sharing regime on death should apply to a marriage notwithstanding that it is void, so long as the parties believe the marriage to be valid; and if either party knows or has reason to believe when the marriage is solemnized that it is void, that party should not be entitled to any allocation of property under the proposed regime. (p. 105)

CONTRACTING OUT OF THE DEFERRED SHARING REGIME

37. That spouses may release all rights to an allocation of property during the spouses' joint lives or on death way way of a spousal agreement. (p. 108)

38. That where a spouse has not, prior to the signing of a spousal agreement, obtained independent legal advice as to the nature of the agreement and its effect on the rights of the spouse under "The Marital Property Act", the court should not give effect to the spousal agreement if at the time it was entered into it was substantially unfair. (p. 108)

39. That any release of or contracting out of dower rights properly made under section 23 of "The Dower Act" before the coming into force of a deferred sharing regime on death should bar the right to seek an accounting on death. (p. 109)

40. That any spousal agreement properly made under paragraph 1(1)(f) of "The Marital Property Act" before the coming into force of recommendation 38 should be given the same weight and consideration it would have been given had it been considered in any proceeding before the coming into force of recommendation 38. (p. 109)

DE FACTO RELATIONSHIPS

41. That a deferred sharing regime on death should apply only to those persons who are married. (p. 110)

ANTI-AVOIDANCE MEASURES

Dissipation

42. That for purposes of an accounting on death and during the spouses' joint lives, where a spouse dissipates an asset, the value of the dissipated asset should be added to that spouse's inventory of property. (p. 120)

Unreasonably Large Dispositions

43. That subsections 6(8) and (9) of "The Marital Property Act" be repealed and the following substituted therefor:

That in both an accounting on death and during the spouses' joint lives, where a spouse makes an unreasonably large disposition of real or personal property, not including a genuine business transaction,

(a) as a transfer by gift *inter vivos*, whether by deed, delivery or declaration of irrevocable trust or

(b) as a transfer for inadequate consideration,

the value of the amount by which the court considers the disposition to have been unreasonably large as at the date of the transfer, should be added to the inventory of the spouse making the transfer. (pp. 126-127)

44. That in determining whether a disposition of property is a disposition of an unreasonably large amount of property, the court should consider:

(a) the ratio of the value of the property disposed of to the value of the property retained at the time of the transfer;

(b) the aggregate value of all property disposed of under prior and simultaneous dispositions, whether those dispositions were made prior to or subsequent to the cut-off period;

(c) any moral or legal obligation of the spouse to make the disposition;

(d) the amount in money or money's worth of any consideration paid by the person to whom the property was disposed;

(e) any other circumstance that the court considers relevant. (p. 127)

Recovery from Third Parties

45. That subsections 6(10) and (11) of "The Marital Property Act" be repealed and the following substituted therefor:

That subject to the exception in recommendation 48, where a spouse effecting an unreasonably large disposition is unable to satisfy any amount payable to the other spouse in an accounting of assets either during the spouses' joint lives or on death, recovery of the value of the amount by which the court considers the transfer to have been unreasonably large, up to the total of the unsatisfied portion, may be made from the transferee for the benefit of whom the disposition was made, whether or not the transferee still holds any interest in the property disposed of to him/her. (p. 132)

46. That for purposes of recommendation 45, the property which is the subject matter of the transfer should be valued at its fair market value as at the date the transferee becomes beneficially entitled to the property or the date of the application to seek an accounting, whichever amount is lower. (p. 132)

47. That where the spouse has made several dispositions of property that were unreasonably large, no person to whom property was disposed of should be ordered to pay more than his/her pro rata share based on the extent to which the disposition was unreasonably large. (p. 132)

48. That a transferee for the benefit of whom the disposition was made, acting in good faith and without actual or constructive notice that the intention of the spouse in making the unreasonably large disposition was to prevent or reduce the amount of a balancing claim, should not be liable to contribute to the payment of a balancing claim. (p. 133)

49. That for purposes of recommendation 48, the requisite intent on the part of a spouse should be satisfied where the court is of the opinion that, on a balance of probabilities, the intention of the spouse, though not necessarily the sole or dominant intention, in making the disposition was to remove property from his/her estate in order to prevent or reduce the amount of a balancing claim. (p. 133)

Cut-off Period

50. That subject to recommendation 31, in order to cause the inclusion of a dissipated asset or an unreasonably large disposition in the appropriate spouse's inventory, the spouse must apply to the court for an accounting before the expiry of two years from the date of the dissipation or from the date of the unreasonably large disposition or from the date of discovery thereof. (p. 135)

Will Substitutes

51. That the value of the property transferred by the deceased spouse to or for the benefit of any person other than the surviving spouse should be added to the inventory of assets of the deceased spouse to the extent that the deceased spouse did not receive a full and adequate consideration in money or money's worth, if the transfer is any one of the following:

(a) a gift mortis causa

(b) any transfer whereby property is held at the time of the spouse's death by the spouse and another with the right of survivorship;

(c) any transfer of property in trust or otherwise, to the extent that the deceased spouse, at the time of death, retained a power, either alone or in conjunction with others, to revoke, to consume or to dispose of the principal thereof for his/her own benefit;

(d) any transfer of property under which the spouse retained at the time of death the possession of or enjoyment of or the right to income from the property;

(e) the designation of a beneficiary to receive an amount payable under a policy of insurance which was effected on the life of the deceased and owned by him or her;

(f) the designation of a beneficiary to receive a death or survivorship benefit in regard to an annuity, pension plan, retirement savings plan or any other similar plan intended to provide income for retirement. (pp. 139-140)

52. That funds in a joint bank account should be included in the inventory of the deceased spouse only to the extent that the funds on deposit were the property of the deceased spouse immediately before the deposit. (p. 141)

53. That where real property is held as a joint tenancy, the amount to be included in the inventory of the deceased spouse should be the ratio of the contribution of the deceased to the contribution of all the parties multiplied by the fair market value of the property at the time of the deceased spouse's death. (p. 141)

54. That a spouse seeking an accounting on death has the burden of establishing that the funds or property, or any portion thereof, belonged to the predeceasing spouse. (p. 141)

55. That any person may pay or transfer any funds or property to any person otherwise entitled unless the person has been personally served with a certified copy of a suspensory order enjoining such payment or transfer. (p. 142)

56. That a judge may make a suspensory order directing the person who benefitted or any person who holds property on behalf of the person benefitted not to transfer any property which is the subject matter of the transactions set out in recommendation 51, where in the opinion of the judge there may be insufficient assets in the net estate of the deceased spouse out of which to provide a balancing claim for the survivor. (p. 142)

57. That proceeds payable under a life insurance policy should not be included in the deceased spouse's inventory of assets where such proceeds are:

    (i) payable to a third party in respect of a business undertaking;

    (ii) pursuant to a court order under "The Family Maintenance Act"; or

    (iii) in accordance with the terms of a separation agreement. (p. 143)

58. That where the deceased spouse has effected any of the transfers set out in recommendation 51, and the deceased's estate is unable to satisfy any amount payable to the surviving spouse in an accounting of property on death, recovery of the value of the benefit received or to be received, less the value of the consideration in money or money's worth, if any, may be ordered from the recipient of the transfer. (p. 144)

59. That where the spouse has made several transfers set out in recommendation 51, no person to whom property was transferred should be orderd to pay more than his/her pro rate share. (p. 145)

60. That the transfers listed in recommendation 51 should be specifically excluded from the application of the provisions respecting unreasonably large dispositions. (p. 145)

61. That any unreasonably large disposition of property or any transfer set forth in recommendation 51 should be excluded from the transferor spouse's inventory of property if made with the written consent of the other spouse in the manner and form prescribed by statute. (p. 146)

62. That where there are insufficient assets in the intestate's estate to satisfy the balancing claim payable to the surviving spouse in an accounting of property on death, liability for the unsatisfied portion of the balancing claim should be equitably apportioned among any recipient of an unreasonably large disposition, any beneficiary under a will substitute device and any issue of the intestate spouse in proportion to the value of their interests in the intestate's estate. (p. 148)

Contracts to Leave Property by Will

63. That subject to recommendation 64, where a spouse has entered into an enforceable contract to devise property by will, the court may order the promisee to contribute to a balancing claim, whether or not the spouse complied with the agreement, where the court is satisfied that:

    (1) the value of the property exceeds the value of the consideration received by the spouse in money or money's worth;

    (2) the spouse entered into the contract with the intention of removing property from his/her shareable estate in order to reduce or defeat a balancing claim;

    (3) the promisee to the contract had actual or constructive notice of this intent; and

    (4) there would be insufficient assets in the net estate to effect a balancing claim after the inclusion in the appropriate spouse's inventory of the amount by which the court considers the value of the property to exceed the value of the consideration received. (pp. 153-154)

64. That in exercising its power in relation to these contracts, the court should ensure that any order will not deprive the promisee of the right to receive property or to recover damages for the breach of the contract in an amount which is not less than the value of the consideration received by the deceased in money or money's worth. (p. 154)

65. That in determining whether the value of the property exceeds the value of the consideration received by the spouse and in what manner to exercise its powers, the court should have regard to:

    (a) the value of the property and the value of the consideration at the date of the contract;

    (b) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract;

    (c) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; and

    (d) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise. (pp. 155-156)

Ancillary Powers

66. That in exercising its powers under recommendations 45, 58 and 63 the court may give such consequential directions as it thinks fit for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby. (p. 157)

Joinder of Parties

67. That for the purposes of reviewing a transfer of property, the court should have power to order the joinder of any necessary additional parties. (p. 158)

Transitional provision

68. That none of the anti-avoidance measures operative on death should apply to any unreasonably large disposition, will substitute or contract entered into before the coming into force of the anti-avoidance measures operative on death. (p. 158)

PART TWO

AN EXAMINATION OF THE HOMESTEAD PROTECTIONS

Statutory Life Estate

69. That the surviving spouse continue to have the statutory entitlement to invoke a life estate in the homestead of the predeceasing spouse in addition to the right to seek an accounting of property on death. (p. 167)

Homestead Definition

70. That the homestead be defined, in part, to mean:

    The land on which a dwelling house in a city, town or village, occupied by the owner thereof, and the owner's spouse as their home is situated, consisting of not more than six lots or one block (where the block is not subdivided into lots) as shown on a plan duly registered in the proper land titles office or registry office, and not more than one acre where the land is described otherwise than by registered plan. (p. 179)

71. That homestead also include a unit and common interests, within the meaning of "The Condominium Act", where that unit is occupied by the owner thereof and the owner's spouse as their home. (p. 179)

72. That homestead be defined, in part, to mean:

    The land on which a dwelling house outside a city, town or village, occupied by the owner thereof and the owner's spouse as their home, is situated, consisting of not more than one hundred and sixty acres, or a quarter section; but where the land and premises of the owner are not in a block, any part thereof in the same section or across a road or highway from that portion thereof on which the dwelling house is situated shall constitute the homestead, but shall consist of not more than one hundred and sixty acres or a quarter section; and if the lands of the owner exceed one hundred and sixty acres in the same section, the homestead shall constitute that portion of the land on which the dwelling house is situated and such other lands in that section as the owner or the owner's personal representative so designates, to the extent of one hundred and sixty acres or a quarter section. (p. 186)

Requisite Ownership Interest

73. That for purposes of the homestead definition, owner includes a spouse who is a lessee of lands and premises for a term in excess of three years. (p. 189)

74. That where a spouse is a joint tenant or tenant in common with a person or persons other than his/her spouse, that land should not be a homestead nor should the spouse have any statutory entitlement to a life estate in such land. (p. 189)

Technical Requirements

75. That where a husband or wife executes a consent to a disposition or a release, (s)he should acknowledge apart from his/her spouse:

    (i) that (s)he is aware of the nature and effect of the consent or release, as the case may be;

(ii) that (s)he is aware of his/her entitlement to a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent;

(iii) that (s)he consents to the disposition or executes the release, as the case may be, for the purpose of giving up, to the extent necessary to give effect to the disposition or release, the life estate in the homestead;

(iv) that (s)he executes the document freely and voluntarily without any compulsion on the part of his/her spouse; and

(v) that, in the case of a release, (s)he has received valuable consideration for the giving of the release. (p. 202)

76. That the prescribed forms in regard to the consent and the certificate of acknowledgment be amended in a similar manner to the following:

(1) Consent to Disposition

I, ... being married to . . . . . , named in the (deed, transfer, mortgage, encumbrance, lease or as the case may be) consent to the disposition of our homestead, made in this instrument, and I have executed this document for the purpose of giving up my life estate in the property given to me by The Homesteads Act, to the extent necessary to give effect to the disposition.

Dated at . . . in the Province of . . . this day of 19 .

. . . .
(Signature of Spouse)

(2) Certificate of Acknowledgment

1 This document was acknowledged before me by . . . . apart from her husband (or his wife).

2 . . . . acknowledged to me that (s)he

(a) is aware of the nature and effect of the consent or release, as the case may be,

(b) is aware that The Homesteads Act gives her (or him) a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent,

(c) consents to the disposition or executes the release, as the case may be, for the purpose of giving up the life estate in the homestead given to her (or him) by The Homesteads Act, to the extent necessary to give effect to the said disposition or release,

(d) executes the document freely and voluntarily without any compulsion on the part of her husband (or his wife),

(e) in the case of a release, has received valuable consideration for the giving of the said release.

Dated at . . . in the Province of. . . this day of , 19 .

. . . .
(Title of officiating officer) (pp. 203-204)

Definition of Disposition

77. That the definition of disposition be amended to include the grant of a right of first refusal to purchase. (p. 205)

Consequences of a Disposition Made in Contravention of the Statute

78. That subject to recommendation 79, where the owner-spouse makes a disposition of any interest in the homestead without the written consent of his/her spouse in the prescribed form, the court should, on application by the non-consenting spouse, set aside the disposition, unless a certificate of acknowledgment has been duly signed by an authorized person or a dower affidavit properly executed. (p. 211)

79. That where the spouse, with full knowledge of his/her homestead rights, has led the other party to the transaction to believe that (s)he consented to the disposition, the court may, in its discretion, order that the spouse be estopped from denying the lack of written consent in conformity to the Act. (p. 218)

Remedies of Non-Consenting Spouse

80. That the non-consenting spouse should have a cause of action against the owner-spouse if a disposition of the homestead is made without consent through the fraud or wrongful act of the owner spouse. (p. 222)

81. That on application by the non-consenting spouse, the court may, in its discretion, determine the amount of damages to be paid by the owner spouse subject to such terms and conditions as the court considers appropriate. (p. 223)

82. That if the owner spouse dies, the action for damages may be commenced or continued against the estate of the deceased spouse, but the liability of the personal representative named in the action is limited to those estate assets which are undistributed at the time of the service of the originating notice upon the personal representative. (p. 223)

83. That no action for damages should be commenced except within six years from the discovery by the spouse of the disposition, and within two years from the death of the owner spouse. (p. 223)

84. That where the non-consenting spouse recovers a judgment against the owner spouse when a disposition of the homestead is made without consent, the owner spouse, on producing proof satisfactory to the Registrar of Land Titles that the judgment has been paid in full, may register a certified copy of the judgment in the proper land titles office. (223)

85. That upon registration of the certified copy of the judgment, the spouse of the owner ceases to have any homestead rights in any land registered or to be registered in the name of the owner spouse. (p. 224)

86. That "The Real Property Act" be amended to ensure that the non-consenting spouse has the right to obtain payment from the Assurance Fund of an unsatisfied judgment against the owner spouse in respect of a disposition of the homestead that is made without consent through the fraud or wrongful act of the owner spouse. (p. 227)

This is a Report pursuant to section 5(3) of "The Law Reform Commission Act, signed this 19th day of November, 1984.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

George H. Lockwood, Commissioners

Lee Gibson

Lee Gibson, Commissioner

John Irvine

John C. Irvine, Commissioner

APPENDIX A

Section 16 of "The Dower Act", C.C.S.M. c. D100 provides as follows:

Section 15 does not apply to any of the following cases:

(a) Where the testator has provided an annual income for his wife during her life of not less than $15,000, whether the provisions be by settlement (before or after marriage) or trust deed, or by the will of the testator, or by insurance policies on the life of the testator, or partly by one of such methods and partly by another.

(b) Where the testator has by his will left to his wife, or for her benefit and for her own use, property of the value of not less than $250,000 over and above any encumbrances.

(c) Where the testator, during his lifetime, has conveyed after marriage to his wife or for her benefit, and for her own use as a gift or by way of advancement, property of which (or of the proceeds or investments of which) she is at the time of his death the legal or equitable owner, and which property or proceeds or investment is or are then of the value of not less than $250,000 over and above any encumbrances thereon.

(d) Where the testator has by his will left to his wife, or for her benefit and for her own use, certain property and had also during his lifetime conveyed after marriage to her, or for her benefit and for her own use, as a gift or by way of advancement, property of which (or of the proceeds or investments of which) she is at the time of his death the legal or equitable owner, and the aggregate value of the property left by the will and such other property, proceeds and investments is not less than $250,000 over and above any encumbrances thereon.

(e) Where the wife receives, or is to receive, for her own benefit under or by virtue of insurance policies on the life of her husband an amount of not less than $250,000, whether payable in instalments or otherwise.

(f) Where, at the time of the death of the testator, any two or more of the following, viz.;

 (i) moneys which the wife of the testator receives, or is to receive, for her own benefit, under or by virtue of any insurance policy or policies on the life of the testator, whether payable in instalments or otherwise;

 (ii)

property left by the will of the testator to his wife or for her benefit and for her own use;

(iii) property (or the investments or proceeds thereof) which during the lifetime of the testator, after marriage, he conveyed to his wife, or for her benefit and for her own use, as a gift or by way of advancement, and of which she is at the time of his death the legal or equitable owner;

aggregate in value not less than $250,000 over and above any encumbrances.

(g) Where, at the time of the death of the testator, any one or more of the following, viz.;

(i) moneys which the wife of the testator receives, or is to receive, for her own benefit, under or by virtue of any insurance policy or policies on the life of the testator, whether payable in instalments or otherwise;

(ii) property left by the will of the testator to his wife, or for her benefit and for her own use;

(iii) property (or the investments or proceeds thereof) which during the lifetime of the testator, after marriage, he conveyed to his wife, or for her benefit or for her own use, as a gift or by way of advancement, and of which she is at the time of his death the legal or equitable owner;

is or are in the aggregate of the value of not less than $150,000 over and above any encumbrances, and in addition, the testator has provided an annual income for his widow during her life of not less than $10,000, whether the income be provided by settlement (before or after marriage) or trust deed, or by the will of the testator, or by insurance policies on the life of the testator, or partly by one of such methods and partly by another.

APPENDIX B

The following list sets forth those sections of "The Marital Property Act" which govern the determination of whether or not a particular property acquisition is shareable:

Section 3
Section 4(1), (2), (3), (4)
Section 6(4), (5), (6)
Section 7(1), (2), (3), (4), (5)
Section 8(1), (2)
Section 9

APPENDIX C

PART OF THE OFFICIAL TEXT OF THE AMERICAN UNIFORM PROBATE CODE

Section 2 - 202. [Augmented Estate.]

The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) any transfer made to a donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed $3,000.00.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(2) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible (sic) in the spouse's augmented estate if the surviving spouse had predeceased the decedent to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this paragraph:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death by decedent and the surviving spouse with right of survivorship, any property held by decedent and transferred by contract to the surviving spouse by reason of the decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

(3) For purposes of this section a bona fide purchaser is a purchaser for value in good faith and without notice of any adverse claim. Any recorded instrument on which a state documentary fee is noted pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

APPENDIX D

Most of the cases to date have all arisen in the different, though related, context of dependants' relief legislation. In most instances, a dependant is seeking to include property which is the subject matter of these transactions into the deceased's net estate so that provision may be made for his/her maintenance and support. The cases consider the following types of dispositions and, in each instance, the property was held not to be a part of the deceased's estate for the purposes of dependants' relief legislation.

Dower v. The Public Trustee (1962), 38 W.W.R. 129 (Alta. S.C.).
*Inter vivos gifts aggregating about one million dollars.

Collier v. Yonkers (1967), 61 W.W.R. 761 (Alta. App. Div.)
*Creation of an irrevocable trust with a power to encroach on income.

Re Dalton and McDonald Estate, [1938] 2 D.L.R. 798 (B.C.C.A.)
*A policy of insurance where the beneficiary is a preferred beneficiary.

Kerslake v. Grey, [1957] S.C.R. 516.
*The proceeds of an insurance policy payable to a named beneficiary.

Re Young, [1955] O.W.N. 789 (C.A.).
*Nomination of a third party as beneficiary of two pension funds.

Re Naylor, [1940] 1 D.L.R. 716 (Ont. S.C.).
*Insurance proceeds payable under policies which had been assigned to the deceased's secretary.

Re Maxwell Estate (1962), 38 W.W.R. 23 (Sask. Q.B.).
*Property held jointly by a deceased and his wife during his lifetime is not part of the "estate" under "The Dependants Relief Act".

APPENDIX E

Sections 20 and 21 of the Uniform Dependants Relief Act provide as follows:

> 20. (1) Subject to section 15, for the purpose of this Act, the capital value of the following transactions effected by a deceased before his death, whether benefiting his dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be considered to be part of his net estate for purposes of ascertaining the value of his estate:
>
> 1. Gifts mortis causa.
>
> 2. Money deposited together with interest thereon, in an account in the name of the deceased in trust for another or others with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased.
>
> 3. Money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of those persons with any chartered bank, savings office, credit union or trust company, and remaining on deposit at the date of the death of the deceased.
>
> 4. Any disposition of property made by a deceased whereby property is held at the date of his death by the deceased and another as joint tenants with right of survivorship or as tenants by the entireties.
>
> 5. Any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof; but the provisions of this paragraph do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased.
>
> 6. Any amount payable under a policy of insurance effected on the life of the deceased and owned by him.

(2) The capital value of the transactions referred to in subsection (1)(b) (c) and (d) shall be considered to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entireties was furnished by the deceased.

(3) Dependants claiming under this Act have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased.

(4) Where the other party to a transaction described in subsection (1)(c) or (d) is a dependant, such dependant shall have the burden of establishing the amount of his contribution, if any.

(5) This section does not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on such corporation or person a certified copy of a suspensory order made under section 3 enjoining such payment or transfer.

(6) Personal service upon the corporation or person holding any such fund or property of a certified copy of such suspensory order is a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period such order is in force and effect.

(7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

21 (1) Where, upon an application for an order under section 2, it appears to the court that

(a) the deceased has within one year prior to his death made an unreasonably large disposition of real or personal property

(i) as an immediate gift inter vivos, whether by transfer, delivery, declaration of revokable (sic) or irrevocable trust or otherwise, or

(ii) the value of which at the date of the disposition exceeded the consideration received by the deceased therefor; and

(b) there are insufficient assets in the estate of the deceased to provide adequate maintenance and support for the dependants or any of them,

the court may, subject to subsection (2), order that any person who benefited, or who will benefit, by the disposition pay to the executor, administrator or trustee of the estate of the deceased or to the dependants or any of them, as the court may direct, such amount as the court considers adequate for the proper maintenance and support of the dependants or any of them.

(2) The amount that a person may be ordered to pay under subsection (1) shall be determined in accordance with the following rules:

1. No person to whom property was disposed of is liable to contribute more than an amount equal to the extent to which the disposition was unreasonably large.

2. If the deceased made several dispositions of property that were unreasonably large, no person to whom property was disposed of shall be ordered to pay more than his pro rata share based on the extent to which the disposition was unreasonably large.

3. The court shall consider the injurious effect on a person to whom property was disposed of from an order to pay in view of any circumstances occurring between the date of the disposition of the property and the date on which the transferee received notice of the application under section 2.

4. If the person to whom the property was disposed of has retained the property, he is not liable to contribute more than the value of his beneficial interest in the property.

5. If the person to whom property was disposed of has disposed of or exchanged the property in whole or in part, he is not liable to contribute more than the combined value of any remaining original property and any remaining proceeds or substituted property.

6. For the purposes of paragraphs 4 and 5 "value" is the fair market value as at the date of the application under section 2.

(3) In determining whether a disposition of property is a disposition of an unreasonably large amount of property within the meaning of subsection (1), the court shall consider

(a) the ratio of value of the property disposed of to the value of the property determined under this Act to comprise the estate of the deceased at the time of his death;

(b) the aggregate value of any property disposed of under prior and simultaneous dispositions and for this purpose the court shall consider all dispositions drawn to its attention whether made prior or subsequent to one year prior to the death of the deceased;

(c) any moral or legal obligation of the deceased to make the disposition;

(d) the amount, in money or moneys (sic) worth, of any consideration paid by the person to whom the property was disposed; and

(e) any other circumstance that the court considers relevant.

APPENDIX F

AN EXAMPLE OF PRO RATA SHARING IN THE CASE OF AN INTESTACY

STEP ONE: Calculate survivor's total intestate benefits

Preferential share	$ 50,000
Distributive share	5,000
Value of survivor's share	$ 55,000

STEP TWO:! Deduct survivor's intestate benefits from the balancing claim

Balancing claim	$150,000
Less survivor's intestate benefits	55,000
Deficiency needed to satisfy balancing claim	$ 95,000

STEP THREE: Add the maximum contribution which may be sought from each recipient determined in accordance with the rules respecting recovery from third parties

Friend's share (gift mortis causa)	$ 40,000
Relative A's share (unreasonably large dispn)	100,000
Relative B's share (unreasonably large dispn)	100,000
Child of deceased (benefit on intestacy)	2,500
Child of deceased (benefit on intestacy)	2,500
Total	$245,000

STEP FOUR: Calculate the pro rata proportion for contribution of each of the recipients of the deceased's estate using the maximum contribution from each recipient as the numerator and the total sum of each of the contributions which may be sought from the respective recipients as the denominator. The contribution of each recipient is determined by multiplying their pro rata proportion by the deficiency.

Child of intestate =	$\frac{2,500}{245,000} \times 95,000 =$	969.38
Child of intestate =	$\frac{2,500}{245,000} \times 95,000 =$	969.38
Friend's share =	$\frac{40,000}{245,000} \times 95,000 =$	15,510.23
Relative A's share =	$\frac{100,000}{245,000} \times 95,000 =$	38,775.51
Relative B's share =	$\frac{100,000}{245,000} \times 95,000 =$	38,775.50
Value of Total Contribution		95,000.00

APPENDIX G

***indicates those sections which have been amended.**

A (PROPOSED) ACT RESPECTING THE HOMESTEAD OF MARRIED PERSONS

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Short title.

1 This Act may be cited as: "The Homesteads Act"

INTERPRETATION

Definitions

2 In this Act,

(a) "attorney" means a person authorized to act for and on behalf of another person under a valid written power of attorney;

(b) "committee" means a person appointed, under The Mental Health Act, by the Court of Queen's Bench to whom the custody and management of the estate of a mentally disordered person is committed, including the Public Trustee where, he has been so appointed, or is, under The Mental Health Act, the committee of the estate of a mentally disordered person;

* (c) "court" means the Court of Queen's Bench;

* (d) "disposition" includes every grant, transfer, sale, agreement of sale, grant of an option to purchase, grant of a right of first refusal to purchase, mortgage (legal or equitable), encumbrance, charge, lien, lease for more than three years, and every other disposition of the homestead by Act inter vivos; but does not include a registered certificate of judgment within the meaning of The Judgments Act, or the lien or charge on lands created by the recording or registration of a certificate of judgment; or a lease made for a period not exceeding three years, or a lien under The Mechanics' Liens Act or The Builders' Lien Act;

(e) "homestead" means

* (i) the land on which a dwelling house in a city, town or village, occupied by the owner thereof and the owner's spouse as their home, is situated, consisting of not more than six lots or one block (where the block is not subdivided into lots) as shown on a plan duly registered in the proper land titles office or registry office, and not more than one acre where the land is described otherwise than by registered plan;

* (ii) the land on which a dwelling house outside a city, town or village, occupied by the owner thereof and the owner's spouse as their home, is situated, consisting of not more than one hundred and sixty acres, or a quarter section; but where the lands and premises of the owner are not in a block, any part thereof in the same section or across a road or highway from that portion thereof on which the dwelling house is situated shall constitute the homestead, but shall consist of not more than one hundred and sixty acres or a quarter section; and if the lands of the owner exceed one hundred and sixty acres in the same section, the homestead shall constitute that portion of the land on which the dwelling house is situated and such other lands in that section as the owner or the owner's personal representative so designates, to the extent of one hundred and sixty acres or a quarter section;

* (iii) a unit and common interests, within the meaning of The Condominium Act, occupied by the owner thereof and the owner's spouse as their home.

(f) "mentally disordered person" has the meaning given to that expression in The Mental Health Act;

* (g) "owner" means a married person who is an owner of a freehold estate in land; and includes a married person who is a lessee of leasehold lands and premises for a term in excess of three years;

(h) "will" has the meaning given to it in The Wills Act.

Disposition prohibited without consent

*3(1) No married person shall by act inter vivos make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other party unless

(a) the spouse of the married person consents in writing to the disposition; or

(b) the disposition is in favour of the spouse of the married person; or

(c) the spouse has released in favour of the married person all rights in the homestead as hereinafter provided; or

(d) the spouse, having an estate or interest in the homestead in addition to the rights under this Act, is for the purpose of making a disposition of the spouse's estate or interest, a party to the disposition made by the married person, and executes it for that purpose; or

(e) the court has made an order dispensing with the consent of the spouse as provided for in section 9.

Disposition of homestead voidable without written consent of spouse

*3(2) Except as otherwise provided in this Act, where a married person makes a disposition of any interest in the homestead in contravention of subsection (1), the court shall, on application by the spouse, set aside the disposition.

Estoppel

*3(3) For the purposes of subsection (2), where the spouse, with full knowledge of the homestead rights set forth under this Act, has led the other party to the transaction to believe that the spouse consented to the disposition, the court may, in its discretion, order that the spouse is estopped from denying the lack of written consent in conformity to the Act.

Married person forbidden to act as attorney.

3(4) A married person shall not execute, as attorney for his spouse, a disposition to which reference is made in clause (d) of subsection (1).

DURATION OF THE HOMESTEAD

Written consent of spouse to change of homestead

4(1) The homestead of a married person continues to be the homestead, notwithstanding that the married person may have changed his home, unless and until the spouse consents in writing to the change of homestead, or releases in favour of the married person all rights in the homestead, or until the homestead is sold in accordance with this Act.

Only one homestead.

4(2) The rights of the spouse under this Act in respect of a homestead do not apply to more than one homestead at any one time.

Change of home without consent not to change homestead.

4(3) Where the home of a married person is changed without the consent in writing of the spouse to the change, or without such a release being given, no dwelling house subsequently occupied by the married person as his home becomes the homestead within the meaning of this Act unless and until such a consent in writing to the change is given, or such a release is given, or until the former homestead is sold in accordance with this Act.

Election after death of married person for change of homestead.

4(4) Where, by reason of the married person and the spouse leaving the homestead and taking up residence in another dwelling house without the consent in writing of the spouse to a change of homestead, the dwelling house in which the married person and the spouse resided at the time of death was not the homestead of the married person, the spouse may elect

(a) before the expiry of six months after the granting of letters probate of the will or letters of administration of the estate; or

(b) before the expiry of one month after notice has been served upon the spouse by the executor requiring that spouse to make an election under this subsection;

that the dwelling house in which the married person and the spouse resided at the time of death of the married person shall be the homestead; and upon the filing in the proper land titles office of an election in writing to that effect, signed by the spouse, that dwelling house and no other shall be deemed to have been the homestead of the married person at the time of death.

Form of election.

4(5) An election made under subsection (4) shall be in writing signed by the spouse and may be in Form A in the schedule or to the like effect.

Where surviving spouse does not wish to elect.

4(6) Where, in a case to which subsection (4) applies,

(a) the spouse does not make an election within the time mentioned in clause (a) or (b) of that subsection; or
(b) the spouse notifies the executor in writing that the spouse does not wish to elect that the dwelling house in which the married person and the spouse resided at the time of death, be the homestead;

the spouse is not entitled to make an election under that subsection or to a life interest under this Act in that dwelling house and those lands and premises; and the notice to which reference is made in clause (b) may be in Form B in the schedule or to the like effect.

RELEASES

Spouse may in writing release rights in homestead.

5(1) A spouse may at any time during life, for valuable consideration, in writing, release in favour of the married person, all rights under this Act in respect of any particular homestead described in the release; and, subject to subsection (3), thereafter the spouse has no rights under this Act as against the homestead so released, and it ceases to be a homestead under this Act.

Form.

5(2) Such a release may be in the Form C in the Schedule or to the life effect.

Termination of release.

5(3) Spouses may terminate a release given under subsection (1) respecting a homestead by each of them signing a written consent thereto; and thereupon the property to which the consent relates is again the homestead, subject to any rights that have arisen since the giving of the release.

Order terminating release.

5(4) Notwithstanding subsections (1) and (3), the court, on application by either the husband or wife, made at any time, if it is satisfied

(a) that the release was given without adequate valuable consideration having been given therefor;

(b) that the release was given by reason of the husband and wife having been separated;

(c) that the husband and wife have effected a reconciliation by reason of which they have resumed co-habitation; and

(d) that the rights or interests of any third party will not be adversely affected by a termination of the release;

and, if the court deems it otherwise just and reasonable, may make an order terminating the release, and the order has the same effect as a consent given under subsection (3).

Filing of caveat.

5(5) Where a release has been terminated under this section, the spouse may file a caveat or dower notice as provided in section 11.

Withdrawing release filed in L.T.O.

5(6) Where a release given under subsection (1) has been filed or registered in a land titles office, upon the filing of a consent to the termination of the release given under subsection (3), the district registrar shall withdraw the release.

CONSENTS

Form.

*6(1) A consent to a disposition of the homestead may be in Form D or Form E in the Schedule or to the life effect, and a consent to a change of homestead may be in Form F in the Schedule or to the like effect.

Written consent of spouse to disposition or change of home to be filed in L.T.O.

6(2) A consent required for the disposition by Act inter vivos of a homestead or for the purpose of evidencing a change of homestead under this Act shall be produced and filed in the proper land titles office or registry office in that behalf.

Acknowledgment by spouse

*7(1) When the spouse of a married person executes a consent to a disposition as required under this Act or executes a release under this Act, the spouse shall acknowledge apart from the married person

(a) that the spouse is aware of the nature and effect of the consent or release, as the case may be;

(c) that the spouse is aware that The Homesteads Act gives the spouse a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent;

(c) that the spouse consents to the disposition or executes the release, as the case may be, for the purpose of giving up, to the extent necessary to give effect to the disposition or release, the life estate in the homestead given by The Homesteads Act;

(d) that the spouse executes the consent or release, as the case may be, freely and voluntarily without any compulsion on the part of the married person; and

(e) that the spouse, in the case of a release, has received valuable consideration for the giving of the release.

Persons before whom acknowledgments may be taken and form.

7(2) Subject to section 8, an acknowledgment may be made before any person authorized by the Manitoba Evidence Act to take affidavits; and a certificate in Form G in the Schedule or to the like effect shall be endorsed on or attached to any consent executed by a spouse under this Act and a certificate in Form H in the schedule or to the like effect shall be endorsed on or attached to a release.

Certificate of acknowledgment conclusive evidence of truth of contents.

7(3) Every certificate of acknowledgment in Form G, or Form H, or Form O, in the Schedule or to the like effect, duly signed by any authorized person as aforesaid, is conclusive proof of the truth of the statements therein contained, and of the fact that the spouse who executed the consent or release or power of attorney, as the case may be, was at the date of the certificate the spouse of the married person therein named, (and, in the case of a release, is also conclusive proof that the spouse received valuable consideration for the giving of the release), except as against any person who, at the time when he acquired any alleged right, title, or interest in the lands thereby affected, had actual knowledge of the untruth of the statements or any of them, or that the spouse was not at that date the spouse of the married person named in the certificate (and, in the case of a release, had actual knowledge that valuable consideration had not been given).

Proof of marriage consent, etc., by affidavit or statutory declaration and form.

7(4) Proof as to whether a person who executes a document or instrument affecting land is or is not married, or as to whether the spouse who consents to a disposition is the spouse of the married person, and as to whether the land or any part thereof is or is not the homestead within the meaning of this Act, may be by affidavit or statutory declaration in Form I or Form J in the Schedule or to the like effect, made by that person or by his attorney or, where he is a mentally disordered person, by his committee, or if the land is under the new system, may be by such other evidence or proof as is satisfactory to the district registrar of the district in which the land is situated.

Making of affidavit.

7(5) Such an affidavit or statutory declaration may be made before any person authorized to take an acknowledgment under this Act.

After such proof has been given no inquiry need be made as to truth of matters alleged.

7(6) Where proof has been taken by affidavit or statutory declaration as set out in subsection (5), no person acquiring any right, title, or interest in land under or by virtue of a document or instrument in respect of which such an affidavit or statutory declaration has been made, and no district registrar, is bound to make inquiry as to the truth of any of the matters therein alleged as facts; and no such document or instrument is invalid, except as against any person who, at the time when he acquired any alleged right, title, or interest in the lands therein mentioned, had actual knowledge of the untruth of any of such mtters, or unless the transaction was tained with fraud in which that person participated or colluded.

Onus of Proof.

7(7) The onus of proving such actual knowledge, or of proving such fraud, is upon the person alleging it.

Execution of acknowledgment of disposition that is a mineral interest.

8(1) Where a spouse, as provided in section 6, consents to a disposition of a mineral interest as that expression is defined in The Securities Act, the acknowledgment required under subsection (1) of section 7 shall be made before a barrister-at-law or an attorney-at-law duly admitted and entitled to practise as such in the province, or before a notary public.

Affidavit as to mineral interest.

8(2) In the case of a disposition of a mineral interest as that expression is defined in The Securities Act, the affidavit or statutory declaration required under subsection (4) of section 7 shall be sworn, affirmed, or declared before a barrister-at-law or an attorney-at-law duly admitted and entitled to practise as such in the province, or before a notary public.

DISPENSING WITH CONSENT

Where spouse has been living apart six months or is a mentally disordered person, homestead may be sold

9(1) Where the spouse of the owner of a homestead

(a) has been living apart from the owner for six months or more; or

(b) is a mentally disordered person;

and the owner wishes to make a disposition of the homestead or any part thereof, the court may, on application made to it by any person interested, make an order dispensing with the consent of the spouse upon such terms and conditions as may appear just.

Court may dispense with consent of spouse.

9(2) The court may, in its discretion, by the order dispensing with the consent of the spouse, direct that an amount, to be fixed by the court, shall be paid to or applied for the spouse's benefit, or remain a charge upon the homestead, or be otherwise secured for the benefit of the spouse.

Court may take into account any provision for the spouse.

9(3) Where it is shown, upon the application, that the married person has made a provision for the spouse by marriage settlement, gift inter vivos or otherwise, the court may take the provision into account in fixing the terms and conditions of the order.

LIFE ESTATE IN HOMESTEAD

Spouse to have life estate in homestead on death of owner.

*10(1) Subject to subsection (4) of section 4, upon the death of a married person whose spouse survives the married person, the spouse is entitled to an estate with the full right to possession of the homestead for the spouse's natural life as fully and effectually, and to the same effect, and under the same conditions, as if the married person had left the spouse by will such a life estate in the homestead; and every disposition by will of a married person of the homestead, is subject to the life estate of the spouse.

Consent by spouse to sale of homestead.

10(2) The spouse may consent to a disposition of the spouse's interest in the homestead of the deceased married person made by the executor of his will or the administrator of the deceased's estate.

Form and execution of consent.

10(3) A consent given under subsection (2) shall be in Form K in the Schedule, or to the life effect; and it shall be executed in the presence of a witness who shall sign his name thereto and verify the signature of the spouse by the usual affidavit of execution; but no acknowledgment or certificate of acknowledgment is necessary as provided in section 7.

CAVEATS

Right to file caveat or dower notice.

11(1) Every spouse entitled to dower rights in a homestead under this Act may,

(a) in the case of lands under The Real Property Act, file with the district registrar of the proper land titles district a caveat claiming an interest under this Act in the lands comprising the homestead; and

(b) in the case of old system lands, register in the proper registry office a dower notice in Form L in the Schedule.

Withdrawal of caveat before registration.

11(2) Subject to subsection (6), upon the filing of a caveat as provided in clause (a) of subsection (1), the district registrar shall not complete the registration of any disposition of the homestead described in the caveat unless the caveat is withdrawn, vacated, or discharged.

Attestation of notice.

11(3) Every notice of the kind mentioned in clause (b) of subsection (1) shall be supported by the affidavit or statutory declaration in Form M in the Schedule of the person giving the notice, and an affidavit or statutory declaration of execution by the witness.

Manner of withdrawing or vacating caveat, etc.

11(4) Any such caveat may be withdrawn or vacated in the manner in which a caveat under The Real Property Act may be withdrawn or vacated; and any such dower notice may be discharged by the registration in the proper land titles office of a discharge in Form N in the Schedule signed by the person who registered the notice.

Discharge of caveat and notice.

11(5) The district registrar shall discharge a dower notice or vacate a caveat filed under this Act in respect of a homestead

(a) upon the registration of a consent by the spouse to any disposition that disposes of all the legal and equitable title and interests of the married person in the whole of the lands and premises comprising the homestead; or

(b) upon the registration of a consent by the spouse to a change of the homestead; or

(c) upon the registration of a release by the spouse in favour of the married person, or that spouse's rights in respect of the homestead; or

(d) upon filing of proof, satisfactory to the district registrar, of the death of the spouse; or

(e) upon the filing of an order made by the court under section 9 dispensing with the consent of the spouse to a disposition that disposes of all the legal and equitable title and interests of the married person; or

(f) upon the filing of proof, satisfactory to the district registrar, that the spouses are divorced; or

(g) upon registration of a transfer or conveyance to complete a sale of the homestead under rights arising out of a disposition to which the spouse has consented.

Effect of consent where caveat filed.

11(6) Notwithstanding that a caveat has been filed under subsection (1), in respect of a homestead, where

(a) the spouse has consented to a disposition of the homestead other than a disposition to which reference is made in clause (a) of subsection (5); or

(b) a court has made an order under section 9 dispensing with the consent of the spouse to a disposition of the homestead other than a disposition to which reference is made in clause (a) of subsection (5);

the district registrar may complete registration of the disposition free of the caveat; but the caveat is not thereby vacated or made ineffective in respect of any legal or equitable title and interests of the married person in the homestead that are not affected by the disposition; and subsection (1) of section 15 applies to any such consent or order.

REMEDY OF SPOUSE

Action of spouse.

*12(1) A married person who, without obtaining the consent in writing of the spouse effects a disposition of the homestead through fraud or a wrongful act, and the disposition is one to which a consent is required by this Act, is liable to the spouse in an action for damages.

Damages.

*12(2) The court may, in its discretion, determine the amount of damages for which the married person is liable, subject to such terms and conditions as the court considers appropriate.

Action may be commenced or continued.

*12(3) If the married person dies, the action for damages may be commenced, or continued against the executors or administrators of the estate of the deceased married person, but the liability of the executors or administrators in the action is limited to the assets of the estate that are undistributed at the time of the service of the originating notice of motion on the executors or administrators or any of them.

Limitation period.

*12(4) No action for damages shall be commenced except

(a) within 6 years from the discovery by the spouse of the disposition, and
(b) within 2 years from the death of the married person.

Registration of judgment.

*12(5) When a spouse recovers a judgment against the married person pursuant to subsection (2), the married person on producing proof satisfactory to the Registrar of Land Titles that the judgment has been paid in full may register a certified copy of the judgment in the proper land titles office.

On registration land ceases to be homestead.

*12(6) On the registration of the certified copy of the judgment, the spouse ceases to have any homestead rights in any land registered or to be registered in the name of the married person and the land ceases to be a homestead for the purposes of this Act.

Application of The Real Property Act.

*12(7) Where the spouse recovers a judgment against the married person which cannot be satisfied in whole or in part out of the property of the married person, the provisions of The Real Property Act relating to the Assurance Fund and recovery from it apply to applications for payment out of the Fund insofar as those provisions are not varied by the provisions of this Act.

GENERAL

Procedure for obtaining court order.

13(1) Where, under any provision of this Act, an order may be made, or any matter may be determined by the Court of Queen's Bench, the order shall be made or the matter determined on application made to the court by originating notice, and the rules of the Court of Queen's Bench respecting such applications apply, mutatis mutandis, unless it is otherwise provided in this Act.

Dispensing with notice of application.

13(2) A judge to whom an application to which subsection (1) applies may, where the judge thinks it proper, dispense with service of notice of the application.

Service of notice of application.

13(3) Subject to subsection (2), notice of an application to which subsection (1) applies shall be served upon such persons and in such manner, including service by mail or by public advertisement, as the court directs or subsequently approves.

Service on committee.

13(4) Where any person who is required to be served by a notice of any application or hearing under this Act is a mentally disordered person, the notice may be served upon his committee who may in person or by counsel appear at and take a part in the application or hearing.

Effect on orders.

14(1) The production of a final judgment, order, or determination of a judge made under this Act, or of a certified copy thereof under the hand of the judge and the seal of the court, is sufficient proof as to the matters therein determined.

Filing judgments.

14(2) Every final judgment, order or determination made by a judge under this Act shall be filed in the court.

Appeal.

15 An appeal lies to the Court of Appeal from any order made under this Act.

Spouse may execute consent or release by attorney under power.

16 A consent or release under this Act may be executed, on behalf of a spouse, by an attorney, duly appointed by power of attorney under the hand and seal of the spouse and expressly authorized by the power of attorney to execute any consent or release under this Act; but a spouse shall not execute, as attorney for his spouse, any such consent or release.

Spouse's acknowledgment of power by attorney apart from owner.

*17 Where the spouse appoints an attorney authorized to give a consent or release under this Act, the spouse shall, at the time of executing the power of attorney, acknowledge apart from the married person, being the owner, that the spouse is executing the power of attorney freely and voluntarily without without any compulsion on the part of the married person, and that the spouse is aware of the nature and effect of the same, and a certificate in Form O in the schedule or to the life effect shall be endorsed on or attached to a power of attorney.

Acknowledgment by attorney.

18 Where a consent or release is executed

(a) by an attorney for a spouse duly appointed under this Act; or

(b) in the case of a spouse who is a mentally incompetent by his/her committee;

no such acknowledgment or certificate of acknowledgment is necessary as provided in section 8, but the attorney's signature to the consent or release shall be verified by the usual affidavit of execution.

Consent of spouse not to operate beyond mortgage encumbrance, etc., with which it is given.

19(1) No consent by a spouse to a document or instrument intended to have the effect of a mortgage, encumbrance, charge, lien, or other security upon a homestead or any part thereof and no order of the court dispensing with such a consent shall operate to any greater extent than is necessary to give full effect to the rights of the mortgagee, encumbrancer, chargee, or grantee, under the document or instrument.

Spouse to receive one-half of surplus on sale of homestead under mortgage.

19(2) Where a homestead or any part thereof is sold under any mortgage, encumbrance, charge, lien, or other security, or under any legal process based thereon, the spouse of the owner of the homestead is entitled, subject to subsection (3), to a one-half share of any surplus of the purchase money arising from the sale after satisfaction in full of the claim and costs of the motgagee, encumbrancer, chargee, or grantee, and of any other person having any right, title, or interest in the homestead in priority to any right of the spouse under this Act.

Order respecting spouse living apart

*19(3) The court, on application by any person interested, if it finds that the spouse and the owner of the homestead are living separate and apart, may direct that the spouse shall not have benefit of subsection (2); and on such an order being made that subsection does not apply to the spouse, and the spouse has no right under this Act to any share in the proceeds of sale.

No consent after previous consent given.

20(1) Where a consent to a disposition, or proof relative to a disposition, has been given in writing in the form prescribed by this Act, no further consent or proof is necessary under this Act in respect of any instrument required to be executed pursuant to, or in performance of, the disposition.

Consent, etc., may be part of another document.

20(2) A consent to a disposition of a homestead, or a consent to a change of homestead, or a release of all rights in a homestead in favour of the married person, or an election, under this Act

(a) may be embodied in, or endorsed on, another instrument or document that sufficiently identifies the lands and premises intended to be affected; or

(b) may be a separate document if it sufficiently identifies the lands and premises intended to be affected and, in the case of a consent to a disposition sufficiently identifies the disposition;

and, where it is a separate document, it may be filed in a land titles office or a registry office attached to another document affecting the land or as a separate document.

Order validating defective consent, etc.

21 The Court, upon being satisfied that the spouse of the owner thereof has executed a consent to the disposition thereof, or to a change thereof, or has executed a release thereof in favour of the owner, or

has given an acknowledgment in respect of such a consent or release, voluntarily of his/her own free will and accord, without any compulsion on the part of the owner and being aware of its nature and effect, and, in the case of an acknowledgment, that it was given apart from the owner, notwithstanding that the proof of the execution of the consent or release or the giving of the acknowledgment is not as required under this Act, or that the consent, release, or acknowledgment lacks some formality required under this Act, may make an order validating the consent, release, or acknowledgment, as the case may be, and thereupon it is as valid as though it were executed or given in every way in accordance with the requirements of this Act.

Married persons.

*22(1) This Act applies to all married persons whether or not they have attained the age of 18 years, and for the purposes of this Act and every matter or thing done under or by virtue of its provisions, a married person of whatever age shall be deemed to be an adult.

Actions of committee for spouse.

22(2) Where a spouse is a mentally disordered person that spouse's committee may, without order of the court, on the spouse's behalf

(a) consent to a disposition; or
(b) consent to a change of homestead; or
(c) release rights in the homestead in favour of the owner; or
(d) make an election; or
(e) execute any consent, release, or election; or
(f) make any affidavit or declaration;

under this Act, upon such terms, as the committee deems expedient.

Act not applicable.

*23 When a married person is a joint tenant or tenant in common with a person or persons other than the spouse of that married person, the land is not a homestead within the meaning of this Act nor does the spouse have any statutory entitlement to a life estate in such land.

Defects of form not to invalidate proceedings, etc.

24 No proceeding, act, matter, or thing done, or purporting to be done, under this Act shall be held invalid for a formal defect or omission.

Registration.

25 The Forms L and O in the Schedule for the purpose of being registered, and when registered under this Act, are instruments under The Registry Act as if expressly included in the definition of "instrument" therein.

Saving clause.

26(1) Where by reason of the death of the owner of a homestead before the first day of July, 1964, a person has dower rights in the homestead as defined in The Dower Act, being chapter 65 of the Revised Statutes of Manitoba, 1954, as it was before the first day of July, 1964, that person does not lose those rights by reason of the coming into force of this Act.

Idem.

26(2) Where before the first day of July, 1964, a person filed a caveat or registered a dower notice under The Dower Act, being chapter 65 of the Revised Statutes of Maniotba, 1954, as it was before the first day of July, 1964, the caveator or the person registering the dower notice does not lose any rights that he may have had under The Dower Act aforesaid as it was before the first day of July, 1964, by reason of the coming into force of this Act.

Repeal

27 The following Acts and parts of Acts are repealed:

(a) The Dower Act, being chapter D100 of the Revised Statutes of Manitoba;

(b) Section 18 of the Statute Law Amendment Act (1971), being chapter 82 of the Statutes of Manitoba, 1971;

(c) Section 21 of the Statute Law Amendment Act (1974), being chapter 59 of the Statutes of Manitoba, 1974;

(d) Section 16 of the Statute Law Amendment Act (1976), being chapter 69 of the Statutes of Manitoba, 1976;

(e) Sections 4 to 6 of An Act to amend Various Acts Relating to Marital Property, being Chapter 27 of the Statutes of Manitoba, 1978;

(f) Section 10 of the Statute Law Amendment Act (1979), being chapter 28 of the Statutes of Manitoba, 1978;

(g) Section 24 of the Statute Law Amendment Act (1981) (2) being chapter 38 of the Statutes of Manitoba 1980-81.

Commencement of Act

28 This Act comes into force on a day fixed by proclamation.

SCHEDULE

FORM A
(Section 4)

CONSENT TO CHANGE HOMESTEAD AFTER DEATH OF SPOUSE

In the matter of the estate of I hereby elect that the land hereinafter described, being the dwelling house in which my spouse and I resided at the time of death, be the homestead of my spouse at the time of death. The land herein referred to is described as follows: A.B.

FORM B
(Section 4)

NOTIFICATION TO PERSONAL REPRESENTATIVE OF NO ELECTION

In the matter of the estate of I do not wish to make an election under subsection (4) of section (4) of The Homesteads Act. A.B.

FORM C
(Section 5)

RELEASE TO SPOUSE

I, , being married to , for valuable consideration, do hereby release in favour of my spouse all my rights under The Homesteads Act in respect of the homestead described as follows, namely: (here describe property).

DATED this day of , A.D.
A.B.

FORM D
(section 6)

CONSENT OF SPOUSE TO DISPOSITION (IF EMBODIED IN OR ENDORSED UPON A DISPOSITION

I, , being married to , named in the (deed, transfer, mortgage, encumbrance, lease, etc. or as the case may be) above written (or "written within", as the case may be) consent to the disposition of our homestead, made in this instrument, and I have executed this document for the purpose of giving up my life estate in the property given to me by The Homesteads Act, to the extent necessary to give effect to the disposition.

Dated at in the Province of this day of A.D. 19 .
A.B.

FORM E
(Section 6)

CONSENT OF SPOUSE TO DISPOSITION (BY SEPARATE DOCUMENT)

I, , being married to , named in a certain (deed, transfer, mortgage, encumbrance, lease etc., or as the case may be), dated the day of , A.D. 19 and made between my spouse and with respect to the lands and premises described as follows, namely:
hereby consent to the disposition of our homstead, made in said instrument, and I have executed this document for the purpose of giving up my life estate in the property given to me by The Homesteads Act, to the extent necessary to give effect to the disposition.

Dated at in the Province of this day of 19 .
A.B.

FORM F
(Section 6)

CONSENT TO CHANGE OF HOMESTEAD

I, , being married to , hereby consent to the change of homestead of my spouse from the property described as follows namely: (here describe both properties).

DATED this day of , A.D. 19 .
A.B.

FORM G
(Section 7)

CERTIFICATE OF ACKNOWLEDGMENT BY SPOUSE TO CONSENT

1. The above (or within or attached as the case may be) consent was acknowledged before me by apart from her husband (or his wife).

2. acknowledged to me that (s)he

(a) is aware of the nature and effect of the consent,

(b) is aware that The Homesteads Act gives her (or him) a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent,

(c) consents to the disposition for the purpose of giving up the life estate in the homestead given to her (or him) by The Homesteads Act, to the extent necessary to give effect to the said disposition,

(d) executes the document freely and voluntarily without any compulsion on the part of her husband (or his wife).

Dated at in the Province of this day of 19

A Commissioner for Oaths (or as the case may be)
C.D.

FORM H
(Section 7)

CERTIFICATE OF ACKNOWLEDGMENT BY SPOUSE TO RELEASE

1. The above (or within or attached as the case may be) release was acknowledged before me by apart from her husband (or his wife).

2. acknowledged to me that (s)he

(a) is aware of the nature and effect of the release,

(b) is aware that The Homesteads Act gives her (or him) a life estate in the homestead and the right to prevent disposition of the homestead by withholding consent,

(c) executes the release for the purpose of giving up the life estate in the homestead given to her (or him) by The Homesteads Act, to the extent necessary to give effect to the said release,

(d) executes the release freely and voluntarily without any compulsion on the part of her husband (or his wife),

(e) has received valuable consideration for the giving of the said release.

Dated at in the Province of this day of 19 .

A Commissioner for Oaths (or as the case may be)
C.D.

FORM I
(Section 7)

AFFIDAVIT BY MAKER OF INSTRUMENT (OR HIS ATTORNEY, ETC.)

(Where the maker is unmarried, or where the consent of the spouse is embodied in or endorsed upon a disposition, or where no part of the land is the homestead).

I, , of , in the Province of , make oath and say:

1. That I am the (grantor, transferor or mortgagor, or as the case may be) named in the instrument above (or within) written (or hereto annexed)

2. That I have (or that has) no wife (or husband).
or

3. That the person who consents as wife (or husband) to the instrument above (or within) written (or hereto annexed) is the wife (or husband) of the (grantor, transferor or mortgagor, or as the case may be).
or

4. That no part of the land referred to in the instrument above (or within) written (or hereto annexed) is the homestead of the (grantor, transferor or mortgagor, or as the case may be) within the meaning of The Homesteads Act (or where the grantors, transferors, or mortgagors are husband and wife).

5. That my co-grantor, co-transferor or co-mortgagor, or as the case may be) is the husband or one of the (grantors, transferors or mortgagors, or as the case may be).

6. That my (co-grantor, co-transferor or co-mortgagor, or as the case may be) is the wife of one of the (grantors, transferors or mortgagors, or as the case may be).

Sworn before me at in the Province of this day of , A.D. 19 .

A Commissioner for Oaths, a Notary Public
(or as the case may be)

(If a statutory declaration is made instead of an affidavit above form is to be altered accordingly).

FORM J
(Section 7)

AFFIDAVIT BY MAKER OF INSTRUMENT (OR HIS ATTORNEY, ETC.)

(Where land is the homestead, and the spouse consents or releases by a separate document).

I, , of in the Province of , make oath and say:

1. That I am the (grantor, transferor, or mortgagor, or as the case may be) named in the instrument above (or within) written (or hereto annexed).
2. That the person who has executed the (consent or release) dated the day of A.D. 19 (attached hereto or registered in the land titles office as No.) is the wife (or husband) of me, the (grantor, transferor or mortgagor or as the case may be).

Sworn before me at ,
in the Province of ,
this day of , A.D. 19 .
A Commissioner for Oaths, A Notary Public
(or as the case may be)

(If a statutory declaration is made instead of an affidavit above form is to be altered accordingly)

FORM K
(Section 10)

CONSENT BY SURVIVING SPOUSE TO DISPOSITION BY PERSONAL REPRESENTATIVE

I, , being married to , late of (hereinafter described or described in the deed, transfer, mortgage, encumbrance, lease, etc., or as the case may be above written or within written, as the case may be) that was the homestead of my spouse at the time of death, hereby consent to the disposition by the (executor of his will) (administrator of his estate) of my life estate in the said land, (which is described as follows);

DATED at this day of , A.D. 19 .
A.B.

FORM L
(Secton 11)

HOMESTEAD NOTICE

To the District Registrar of

Take notice that I, A.B. (insert name of claimant and name of husband, or wife, as the case may be) claim homestead rights in the homestead of my said (husband or wife) under The Homesteads Act, the said homestead being the lands and premises described as follows: (Insert legal description of land)

and I claim priority to any instrument affecting those homestead rights unless the instrument be expressed to be subject thereto.

DATED at this day of , A.D. 19 .
Witness:
A.B.

FORM M
(Section 11)

AFFIDAVIT IN SUPPORT OF HOMESTEAD NOTICE

I, A.B., make oath and say (or solemnly declare) as follows:

1. I am the wife (or husband, as the case may be), of C.D.
2. The within described lands are the homestead of the said C.D.
3. This homestead notice is not being registered for the purpose of delaying or embarrassing any person interested in or proposing to deal with the said lands.

Sworn before me, etc.
(Add affidavit or declaration of witness to execution).

FORM N
(Section 11)

DISCHARGE OF NOTICE OF HOMESTEAD RIGHTS

To the District Registrar of

I, A.B. (insert name of claimant and name of husband or wife, as the case may be) hereby withdraw my claim to homestead rights under The Homesteads Act in the lands and premises described as follows:

DATED at this day of , A.D. 19
(Add affidavit or declaration of witness to execution).

FORM O
(Section 15)

CERTIFICATE OF ACKNOWLEDGMENT BY SPOUSE TO POWER OF ATTORNEY

The above (or within or attached as the case may be) power of attorney was acknowledged before me by , wife (or husband) of , apart from her (his) husband (wife), to have been voluntarily executed by her (his) of her (his) own free will and accord, and without any compulsion on the part of her (his) husband (wife). (S)he has further acknowledged that (s)he is aware of the nature and effect of the same.

DATED at this day of A.D. 19 .
A commissioner for Oaths (or as the case may be).
C.D.

Copies may be obtained from the:

Queen's Printer Office
200 Vaughan Street
Winnipeg, Manitoba
R3C 1T5

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